

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. ~~242~~ 242

THE UNITED STATES OF AMERICA, PLAINTIFF
IN ERROR,

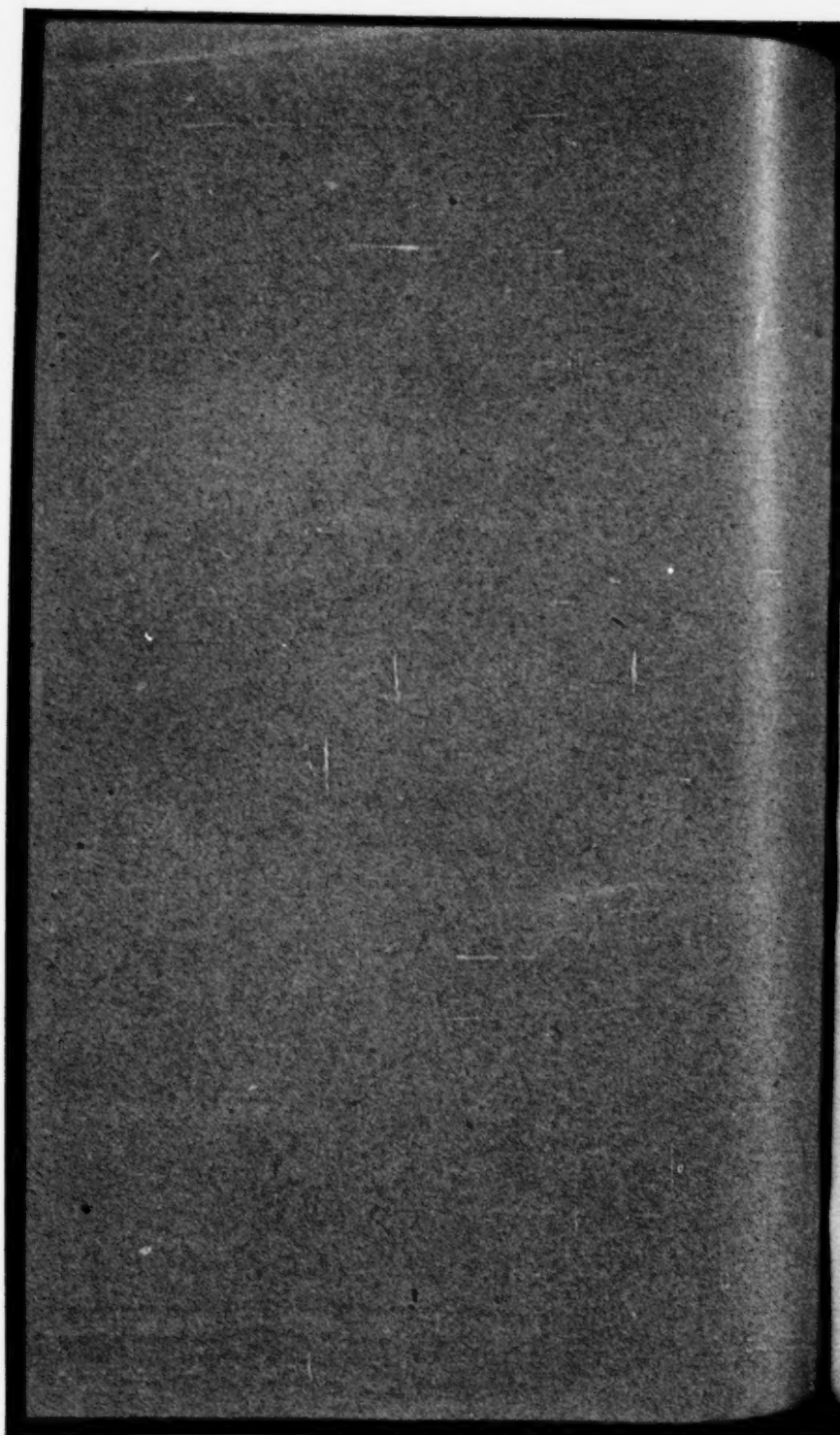
VS.

DOLPH AXMAN AND AMERICAN BONDING COMPANY
OF BALTIMORE.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

FILED APRIL 26, 1912.

(28180.)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 628.

THE UNITED STATES OF AMERICA, PLAINTIFF
IN ERROR,

vs.

RUDOLPH AXMAN AND AMERICAN BONDING COMPANY
OF BALTIMORE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Names and addresses of attorneys.....	1	1
Order extending time to file record on writ of error.....	1	1
Transcript of record from the Circuit Court of the United States for the Northern District of California.....	2	2
Complaint.....	2	2
Summons.....	9	6
Marshal's return.....	11	7
Demurrer of American Bonding Co. of Baltimore to complaint....	12	7
Demurrer of Rudolph Axman to complaint.....	15	9
Order overruling demurrer of Axman.....	19	11
Order overruling demurrer of American Bonding Co.....	20	12
Answer of Rudolph Axman.....	21	12
Answer of American Bonding Co. of Baltimore.....	55	29
Order allowing motion to file amendment to complaint.....	91	49
Amendment to complaint.....	92	49
Verdict, Mar. 26, 1907.....	121	65
Judgment, Mar. 26, 1907.....	122	66
Clerk's certificate to judgment roll.....	124	67
Order spreading mandates from court of appeals on minutes.....	125	67
Mandate.....	125	67
Mandate.....	127	68
Verdict, Dec. 13, 1910.....	129	69
Judgment, Dec. 13, 1910.....	129	70
Certificate to judgment roll.....	131	70
Bill of exceptions.....	132	71
Testimony of William H. Heuer.....	133	71
G. Knight White.....	134	72
Memorandum relative to further examination of William H. Heuer.....	135	72

Transcript of record from the Circuit Court of the United States for
the Northern District of California—Continued.

Bill of exceptions—Continued.	Original.	Print.
Plaintiff's Exhibit A. Contract for dredging San Pablo Bay..	135	73
Testimony of William H. Heuer (continued).....	162	87
Plaintiff's Exhibit B. Letter from W. H. Heuer to Rudolph Axman, Jan. 3, 1903	163	88
Plaintiff's Exhibit E. Letter of W. H. Heuer to Rudolph Axman, Dec. 24, 1903	167	90
Plaintiff's Exhibit F. Endorsement returned to Heuer Dec. 26, 1903	167	90
Plaintiff's Exhibit D. Letter of W. H. Heuer to American Bonding Co., Dec. 24, 1902.....	168	91
Plaintiff's Exhibit G. Contract for dredging San Pablo Bay..	173	93
Testimony of S. C. Hines	202	109
William H. Heuer (recalled).....	208	112
Plaintiff's Exhibit K. Bond of Axman	218	117
Testimony of William Healey.....	221	119
R. A. Perry.....	222	120
M. C. Harris.....	223	120
John Hackett.....	224	121
H. L. Demerit	225	121
Motion for nonsuit	227	122
Testimony of Rudolph Axman.....	230	123
Wilbur F. McClure	266	142
R. A. Perry.....	268	143
M. C. Harris.....	269	143
Defendants rest	271	144
Testimony of C. Knight White.....	271	144
H. L. Demerit	273	145
O. R. Cannon	275	146
William H. Heuer (recalled in rebuttal).....	276	147
Verdict	283	150
Stipulation relative to exhibits.....	284	151
Judge's certificate to bill of exceptions	284	151
Stipulation relative to bill of exceptions	285	151
Petition for writ of error.....	286	152
Assignment of errors	287	152
Order allowing writ of error	301	160
Clerk's certificate to transcript	302	160
Writ of error.....	304	161
Citation	307	163
Clerk's certificate to printed record.....	310	164
Proceedings in Circuit Court of Appeals.....	311	164
Order of submission	312	165
Opinion	313	165
Judgment.....	316	166
Order staying issuance of mandate.....	317	167
Assignment of errors	318	167
Certificate of clerk to transcript of record	333	176
Writ of error.....	334	177
Return on writ of error	335	177
Citation	337	178
Acceptance of service of citation.....	338	178

A

No. 1959.

United States Circuit Court of Appeals for the Ninth Circuit.

United States of America, plaintiff in error,

vs.

Rudolph Axman and American Bonding Company of Baltimore
(a corporation), defendants in error.

Transcript of record.

Upon writ of error to the United States Circuit Court for the
Northern District of California.

1 Names and addresses of attorneys:

Robert T. Devlin, United States attorney, attorney for plain-
tiff in error, Room 317, United States Postoffice and Courthouse Bldg.

Messrs. Aitken & Aitken, attorneys for Rudolf Axman, defendant
in error, Monadnock Bldg., San Francisco, Cal.

Jesse W. Lilienthal, Esq., attorney for American Bonding Com-
pany of Baltimore, defendant in error, Flood Bldg., San Francisco,
Cal.

United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

RUDOLF AXMAN AND AMERICAN BONDING COMPANY OF
Baltimore (a corporation), defendants in error.

Order extending time to file record on writ of error.

Good cause appearing therefor, it is ordered that the time in which
to file the record upon writ of error from the United States Cir-
cuit Court for the Northern District of California be and the
same is hereby extended to and including February 28, 1911.

Dated February 20, 1911.

WM. W. MORROW,

United States Circuit Judge, Ninth Judicial Circuit.

[Endorsed]: No. 1959. United States Circuit Court of Appeals
for the Ninth Circuit. Order under rule 16 enlarging time. Filed
Feb. 16, 1911. F. D. Monckton, clerk. Refiled Feb. 21, 1911. F. D.
Monckton, Clerk.

4 nel, and all material above a depth of 30 feet was to be removed in accordance with the requirements of the Engineer officer in charge, and the side slopes of said channel were to be three horizontal to one vertical along the lines of the proposed completed channel. That in addition to the contract price of material excavated above the 30-foot mark at mean low water, payment was to be made at one-half of the full contract rates for all material shown in the final survey to have been removed from between the depths of 30 and 31 feet in the said channel.

That said contract, among other terms and conditions, contained the following:

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party

5 and parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise in accordance with law."

4.

That to guarantee the faithful performance of the said contract and the completion of the said contract by the said Rudolph Axman, the said Rudolph Axman gave a bond signed by himself and the defendant, American Bonding Company, of Baltimore, Maryland, on the 21st day of November, 1902, in the penal sum of \$50,000.00 wherein and whereby the said defendants bound themselves, their

heirs, executors, administrators, and successors jointly and severally, the condition of the said obligation being:

“That whereas, the above-bounden Rudolph Axman has, on the 21st day of November, 1902, entered into a contract with the
6 United States, represented by Lieutenant Colonel W. H. Heuer, Corps of Engineers, United States Army, for dredging in San Pablo Bay, California. Now, therefore, if the above-bounden Rudolph Axman, his heirs, executors or administrators shall and will in all respects duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by the said contract agreed and covenanted by said Rudolph Axman to be observed and performed, according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States during the original term of the same, and shall promptly make full payments to all persons supplying him with labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue.”

5.

That thereafter, on December 22d, 1902, the said Rudolph Axman entered upon the performance of his contract and proceeded to do a portion of the work contracted for under the terms of his said contract hereinbefore referred to; that the said defendant did fail to prosecute faithfully or diligently, or at all, the work in accordance with the specifications and requirements of said contract, and did refuse to complete or perform the same, or any further part thereof, and did abandon said contract and refuse to do the work in said contract provided, or any part thereof; that by reason of his failure to
7 carry out the terms of the said contract, and to comply with the specifications therefor, and by reason of his violation of the provisions of the said contract, the said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, acting on behalf of the United States of America, did, thereafter, on, to wit, the 24th day of December, 1903, with the sanction of the Chief of Engineers, annul the said contract by giving notice in writing to that effect to the said defendants and each of them, in accordance with the provisions of said contract.

That after the annulment of the contract, the work was readvertised, and on June 21st, 1904, a contract, was made with the North American Dredging Company of San Francisco, California, to do the work left undone by the defendants herein, at the rate of \$14-48/100 per cubic yard. That the North American Dredging Company carried out the work and completed the contract on February 10, 1906. That to complete the work, after the failure of the defendant, Rudolph Axman, to carry out his contract as aforesaid, it became and was necessary for the North American Dredging Company to remove, and it did remove, 2,059,471 cubic yards of material

to the 30-foot mark or plane at low water, and 190,330 cubic yards of material between the 30-foot and the 31-foot marks or planes; that the cost of so removing the said 2,059,471 cubic yards of material at \$.14-48/100 per cubic yard, was \$298,211.40, and the cost of removing 190,330 cubic yards of material as aforesaid, at \$.07-24/100 per cubic yard, was \$13,779.89, or a total of \$311,991.29, while the cost of the same work at the price for which the defendant, Rudolph

8 Axman, contracted to do it would have amounted to the sum of \$246,490.35, made up according to the terms of his contract, as follows: 2,059,471 cubic yards of material removed to the 30-foot plane at low water, as \$.11-44/100 per cubic yard, would cost \$235,603.48, and 190,330 cubic yards of material removed between the 30-foot and 31-foot planes, at \$.05-72/100 per cubic yard, would be \$10,886.87, or a total of \$246,490.35. That the difference between the amount paid by the Government to the North American Dredging Company, to wit, the sum of \$311,991.29, and the amount that would have been paid to the said Rudolph Axman had he carried out his contract, according to the terms thereof, to wit, the sum of \$246,490.35, is the sum of \$65,500.94.

6.

That the plaintiff has done and performed all the conditions and stipulations on its part to be done and performed.

7.

That by reason of his failure to carry out his contract as aforesaid, the plaintiff was compelled to pay, and it did pay, the sum of sixty-five thousand five hundred dollars and ninety-four cents (\$65,500.94) more than it would have cost the plaintiff had the defendant Rudolph Axman carried out his contract aforesaid, according to its terms and conditions.

That by reason of his failure to carry out his contract as aforesaid the plaintiff has been damaged in the sum of \$65,500.94.

9 Wherefore, plaintiff prays judgment against the defendant Rudolph Axman for the sum of sixty-five thousand five hundred dollars and ninety-four cents, and against the defendant, American Bonding Company of Baltimore, Maryland, for the sum of fifty thousand dollars (\$50,000.00), the amount of its bond given for the faithful performance of the contract aforesaid by the said Rudolph Axman, and for such other and additional relief as may be proper or to which plaintiff may show itself entitled, together with the costs and disbursements of this action.

ROBT. T. DEVLIN,

United States Attorney for the Northern District of California.

[Endorsed:] Filed July 3d, 1906. Southard Hoffman, clerk. By J. A. Schaertzer, deputy.

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Judicial Circuit, Northern
District of California.*

THE UNITED STATES OF AMERICA, PLAINTIFF,

vs.

RUDOLPH AXMAN AND AMERICAN BONDING
Company of Baltimore (a corporation),
defendant.

Summons on complaint.

10 Action brought in the said circuit court and the complaint
filed in the office of the clerk of the said circuit court in the
city and county of San Francisco.

ROBERT T. DEVLIN, Esq.,

United States Attorney, Attorney for Plaintiff.

The President of the United States of America, greeting: To Rudolph Axman and American Bonding Company of Baltimore, a corporation, defendants.

You are hereby directed to appear and answer the complaint in an action entitled as above brought against you in the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, within ten days after the service on you of this summons, if served within this county, or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required the said plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract or it will apply to the court for any other relief demanded in the complaint.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, this 3d day of July, in the year of our Lord one thousand nine hundred and six and of our independence the 130th.

[SEAL.]

SOUTHARD HOFFMAN,

Clerk.

By W. B. BEAIZLEY,

Deputy Clerk.

11 *United States Marshal's Office, Northern District of California.*

I hereby certify that I received the within summons on the 19 day of July, 190—, and personally served the same on the 19 day of July, 1906, upon Rudolph Axman, the defendant therein named, by delivering to and leaving with Rudolph Axman, said defendant named therein, personally, at the county of San Francisco, in said

district, a copy thereof, together with what purported to be a copy of the complaint, attached thereto.

Dated at San Francisco, this 20th day of July, 1906.

CHARLES T. ELLIOTT,

U. S. Marshal.

By JAMES L. NOLAN,

Deputy.

United States Marshal's Office, Northern District of Cal.

I hereby certify and return that I received the within writ on the 19 day of July, 1906, and personally served the same on the 24 day of July, 1906, on the American Bonding Company, a corporation, by delivering to and leaving with F. B. Owen, an adult person, who is managing agent of the American Bonding Company, a corporation,

one of said defedants named therein, at the city and county of San Francisco, in said district, an attested copy thereof, together with a copy of complaint attached thereto.

San Francisco, July 24, 1906.

CHARLES T. ELLIOTT,

U. S. Marshal.

By JAMES L. NOLAN,

Deputy.

[Endorsed:] Filed July 24, 1906. Southard Hoffman, clerk. By W. B. Beazley, deputy clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,

vs.

RUDOLPH AXMAN AND AMERICAN BONDING
Company of Baltimore (a corporation),
defendants.

Demurrer of American Bonding Company of Baltimore to complaint.

Now comes the American Bonding Company of Baltimore, herein, and demurs to plaintiff's complaint herein, upon the following grounds:

I.

That complaint does not state facts sufficient to constitute a cause of action against said defendant.

II.

That said complaint is uncertain in that it does not appear therefrom—

- 13 (a) What were the specifications attached to the contract in said complaint referred to.

(b) What were the complete terms of the contract in said complaint referred to.

(c) What were the complete terms of the bond in said complaint referred to.

(d) Who were respectively the party of the first part and the party of the second part referred to in the extract from the contract set forth in paragraph 3 of said complaint.

(e) Whether the expression "mean low water" in paragraph 3 of said complaint referred to indicated the same depth as the expression "low water" in paragraph 5 thereof referred to.

(f) Whether the work alleged to have been left undone by defendant Axman in paragraph 5 of said complaint was work required to be done by him in accordance with the contract and specifications in said complaint referred to.

(g) Whether said Axman was at any time required to remove any part of the 2,059,471 cubic yards of material in said paragraph 5 referred to, or any part of the 190,330 cubic yards of material in said complaint referred to.

(h) Whether the contract alleged to have been made with the North American Dredging Company provided for a rate of 7-24/100 cents per cubic yard for the removal of material between the 30-foot and the 31-foot marks or planes.

(i) Whether the alleged failure of said Axman to prosecute faithfully and diligently the work in said complaint referred to
14 had been determined by the judgment of the engineer in charge thereof.

(j) Whether at the time of said alleged default of said Axman, or of said alleged annulment or notice, there was due or to become due to said Axman any moneys whatsoever, or any percentage had been reserved; and whether any moneys so due or to become due, or any of said reserved percentage, has been retained by W. H. Heuer, lieutenant colonel, etc., in accordance with the terms of said contract and has been applied towards the reduction of the damages in said paragraph 5 referred to.

(k) Whether any of the sums alleged to have been paid said North American Dredging Company were expended by said Heuer in the completion of said contract.

(l) Whether the work alleged in said paragraph 5 to have been done by the North American Dredging Company was done under the same specifications attached to said Axman contract and in said complaint referred to.

(m) Whether the alleged contract with said North American Dredging Company was made with said Heuer, or whether said Heuer proceeded to secure the performance of the work or delivery of materials as provided in the contract in said complaint set forth.

(n) Whether the rates alleged to have been agreed upon in the said alleged contract with the North American Dredging Company were the reasonable or market value of the work therein provided, or the lowest rates that were then obtainable therefor.

15 (o) Whether the sum of \$65,594.00, or any part thereof, has paid by defendants or either of them.

(p) Whether the terms and conditions of the alleged contract with the North American Dredging Company and the specifications thereof were, except as to the rates of payment, the same as the terms, conditions, and specifications in said Axman contract.

Wherefore said defendant American Bonding Company of Baltimore prays to be hence dismissed.

JESSE W. LILIENTHAL,
*Attorney for Defendant American
Bonding Company of Baltimore.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JESSE W. LILIENTHAL,
Counsel for said Defendant.

(Endorsed:) Filed September 11, 1906. Southard Hoffman, clerk.

*In the Circuit Court of the United States, Ninth Circuit, Northern
District of California.*

THE UNITED STATES OF AMERICA, PLAINTIFF, }
vs. }
RUDOLPH AXMAN ET AL., DEFENDANTS. }

Demurrer of Rudolph Axman to complaint.

16 Comes now the defendant Rudolph Axman and appearing herein for himself alone and not for his codefendant, demurs to the complaint of the plaintiff filed herein and specifies the following as the grounds of his demurrer:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint is uncertain in this:

That it does not appear therein, nor can it be ascertain therefrom—

(a) What requirements of the engineer officer in charge are referred to in lines 19, 20, and 21 of page 2, in the words, "and all material above a depth of 30 feet was to be removed in accordance with the requirements of the engineer officer in charge."

(b) What sums, if any, were expended by plaintiff in completing the said contract referred to in line 21 of page 3 of said complaint.

(c) What specifications are referred to in paragraph 2 of said complaint, in line 1 of page 2 thereof.

(d) What violation of the provisions of the said contract is referred to in paragraph five of said complaint in line 15 of page 5 thereof.

(e) What plaintiff means by the allegation in paragraph 5 of said complaint, at lines 22 and 23 thereof, that "after the annulment of the contract the same was readvertised."

(f) Upon what terms and conditions, and in accordance with what specifications, a contract was made with the North American Dredging Company of San Francisco, California, to do the work left undone by the defendants herein, as alleged in paragraphs 5 of said complaint, at lines 23, 24, and 25 thereof.

III.

That said complaint is ambiguous in this:

That it does not appear therein, nor can it be ascertained therefrom—

(a) What requirements of the Engineer officer in charge are referred to in lines 19, 20, and 21 of page 2, in the words, "and all material above a depth of 30 feet was to be removed in accordance with the requirements of the Engineer officer in charge."

(b) What sums, if any, were expended by plaintiff in completing the said contract referred to in line 21 of page 3 of said complaint.

(c) What specifications are referred to in paragraph 2 of said complaint, in line 1 of page 2 thereof.

(d) What violation of the provisions of the said contract is referred to in paragraph 5 of said complaint, in line 15 of page 5 thereof.

(e) What plaintiff means by the allegation, in paragraph 5 of said complaint, at lines 22 and 23 thereof, that "after the annulment of the ontract the same was readvertised."

(f) Upon what terms and conditions, and in accordance with what specifications, a contract was made with the North American Dredging Company of San Francisco, California, to do the work left undone by the defendants herein, as alleged in paragraph 5 of said complaint, at lines 23, 24, and 25 thereof.

IV.

That said complaint is unintelligible:

18 That it does not appear therein, nor can it be ascertained therefrom—

(a) What requirements of the Engineer officer in charge are referred to in lines 19, 20, and 21 of page 2, in the words, "and all material above a depth of 30 feet was to be removed in accordance with the requirements of the Engineer officer in charge."

(b) What sums, if any, were expended by plaintiff in completing the said contract referred to in line 21 of page 3 of said complaint.

(c) What specifications are referred to in paragraph 2 of said complaint, in line 1 of page 2 thereof.

(d) What violation of the provisions of the said contract is referred to in paragraph 5 of said complaint, in line 15 of page 5 thereof.

(e) What plaintiff means by the allegation, in paragraph 5 of said complaint, at lines 22 and 23 thereof, that "after the annulment of the contract the same was readvertised.

(f) Upon what terms and conditions, and in accordance with what specifications, a contract was made with the North American Dredging Company of San Francisco, California, to do the work left undone by the defendants herein, as alleged in paragraph 5 of said complaint, at lines 23, 24, and 25 thereof.

Whereof, defendant prays that plaintiff take nothing by this action, and that defendant be hence dismissed with his costs.

AITKEN & AITKEN,

Attorneys for Defendant Rudolph Axman.

19 I hereby certify that I believe the above demurrer to be well founded in point of law.

JOHN R. AITKEN,

Of Counsel for Defendant Rudolph Axman.

Receipt of a copy of the within demurrer of Rudolph Axman is hereby admitted this 21st day of September, 1906.

ROBERT T. DEVLIN,

United States Attorney for the Northern District of California.

[Endorsed:] Filed Sept. 21, 1906. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

At a stated term, to wit, the November term A. D. 1906, of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Monday, the 10th day of December, in the year of our Lord one thousand nine hundred and six. Present: The honorable John J. De Haven, district judge.

THE UNITED STATES OF AMERICA

vs.

RUDOLPH AXMAN ET AL.

} No. 13914.

Order overruling demurrer of Axman to complaint, etc.

20 The demurrer of Axman to the complaint herein came on this day to be heard, and after argument by the attorneys for the respective parties, it is ordered that said demurrer be and the same hereby is overruled, with leave to the defendant Axman to answer herein within 30 days. Further ordered that the demurrer of the defendant American Bonding Co. be continued to the 17th instant for hearing.

At a stated term, to wit, the November term A. D. 1906, of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Tuesday, the 18th day of December, in the year of our Lord one thousand nine hundred and six. Present: The honorable John J. De Haven, district judge.

UNITED STATES OF AMERICA	} No. 13914.
<i>vs.</i>	
RUDOLPH AXMAN ET AL.	

Order overruling demurrer of American Bonding Company to complaint, etc.

The demurrer of the defendant American Bonding Co. to the complaint herein, heretofore submitted to the court for consideration and decision, and the court having delivered its opinion orally, it is in accordance with said oral opinion ordered that said demurrer be and the same hereby is overruled, with leave to defendant to answer herein within twenty days.

21 *In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

THE UNITED STATES OF AMERICA, PLAINTIFF,	} No. 13914.
<i>vs.</i>	
RUDOLPH AXMAN AND AMERICAN BONDING COMPANY OF Baltimore (a Corporation), defendants.	

Answer of Rudolph Axman to plaintiff's complaint.

Comes now the defendant Rudolph Axman and appearing herein for himself alone, and not for his codefendant herein, for answer to the complaint of plaintiff denies each and every, all and singular the allegations in said complaint contained.

For a further answer to said complaint this defendant denies that on the 22d or any day of November, 1902, or on any day, or at any time, at the city and county of San Francisco, or elsewhere, he entered into a certain contract and agreement, or any contract or agreement, in writing, or otherwise, with W. H. Heuer, lieutenant colonel Corps of Engineers, United States Army, acting on behalf of the United States of America, wherein and whereby, or wherein or whereby, he, for himself, his heirs, executors, and administrators, or for himself, or his heirs, or executors, or administrators, or either or any of them, did covenant and agree, or covenant or agree, that he would do such dredging in San Pablo Bay, California, as might be required by the said W. H. Heuer in accordance with certain specifications, or any specifications, which were and are

22

attached to the said, or any, contract and agreement, or were or are attached to said or any contract, or made a part thereof, at the rate of \$.1144 per cubic yard for all of such dredging as should be done in strict accordance with the said specifications attached to said contract, or at any rate per cubic yard for all or any of such dredging as should be done in strict or any accordance with said or any such specifications.

Denies that by the terms of his said contract, and in accordance with the specifications attached to and made a part of it, or by the terms or any contract made or entered into as alleged by plaintiff, he agreed to dredge a channel through the shoal in San Pablo Bay, extending from Pinole Point to Lone Tree Point.

Denies that the channel so to be dredged was to have a bottom width of 300, or any number of feet, and a depth of 30, or any number of feet at mean low water, and a length of about 27,000, or any number of feet.

Denies that by the terms of said contract and in accordance with the specifications attached to and made a part of it, all or any material above a depth of thirty or any number of feet was to be removed in accordance with the requirements of the engineer officer in charge, or that the side slopes of said channel were to be three horizontal to one vertical along the lines of the proposed completed channel.

23 Denies that by said contract, or by any contract alleged in said complaint to have been made or entered into by defendant, there was to be paid one-half of the full contract rates for all material shown in the final survey to have been removed from between the depths of 30 and 31 feet in the said channel in addition to the contract price of material excavated above the thirty-foot mark at mean low water.

Denies that said contract contained, among other terms and conditions, the paragraph quoted and recited in plaintiff's complaint as follows:

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party

24 of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United State in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise in accordance with law."

Denies that to guarantee the faithful performance of the contract and the completion of said contract, alleged in plaintiff's complaint to have been made by defendant, the defendant gave a bond signed by him and the American Bonding Company of Baltimore, Maryland, on the 21st or any day of November, 1902, in the penal sum of \$50,000, or any sum whatever, wherein or whereby the defendants *bond* themselves, their heirs, executors, administrators, and successors, or bound either of themselves, or the heirs, or the executors, or the administrators, or the successors of either of them, jointly and severally, or jointly or severally, or otherwise, or at all, or in which the condition of said bond or said obligation was: "That whereas,

25 the above-bounden Rudolph Axman has, on the 21st day of November, 1902, entered into a contract with the United States, represented by Lieutenant-Colonel W. H. Heuer, Corps of Engineers, United States Army, for dredging in San Pablo Bay, California, now, therefore, if the above-bounden Rudolph Axman, his heirs, executors, or administrators shall and will in all respects duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by the said contract agreed and covenanted by said Rudolph Axman to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States during the original term of the same, and shall promptly make full payments to all persons supplying him with labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue."

Denies that he ever did enter upon the performance of the contract alleged in said complaint to have been made, and denies that he proceeded to do any work whatever thereunder.

Denies that he did fail to prosecute faithfully or diligently the work in accordance with the specifications and requirements of said contract.

Denies that he did refuse to complete or perform the same.

Denies that he refused to complete or perform any further part thereof.

Denies that he did abandon said contract and refuse to do the work in said contract provided for, or did refuse to do any part thereof.

Denies that by reason of his failure to carry out the terms of the said contract and to comply with the specifications, therefore and by reason of his violation of the provisions of the said contract, or by reason of his failure to carry out the terms of any contract whatever, or by reason of his failure to comply with the specifications of any contract, or by reason of his violation of the provisions of the said or any contract whatever, the said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States of America, acting on behalf of the United States of America, did, on the 24th or any day of December, 1903, or any day whatever, with the sanction of the Chief of Engineers, annul the said contract by giving notice in writing to that effect to the defendants herein and to each or either of them in accordance with the provisions of said contract, or otherwise, or at all.

Denies that the work was readvertised after the annulment of the contract.

Denies that a contract was made with the North American Dredging Company of San Francisco, California, or with any company on the 21st or any day of June, 1904, or on any day whatever, to do the or any work left undone by the defendants herein at the rate of \$.1448 per cubic yard, or at any rate whatever.

Denies that the North American Dredging Company, or any company or person whomsoever, carried out the or any work and completed the contract, or completed any contract, on February 10, 1906.

Denies that to complete the work after the failure of this defendant to carry out said contract, it became and was necessary for the North American Dredging Company to remove 2,059,471 cubic yards of material to the 30-foot mark or plane at low water or 190,330 cubic yards of material between the 30-foot and the 31-foot marks or planes.

Denies that the North American Dredging Company did remove 2,059,471 cubic yards of material to the thirty-foot plane at low water.

Denies that the North American Dredging Company did remove 190,330 cubic yards of material between the 30-foot and the 31-foot marks or planes.

Denies that the cost of so removing the said 2,059,471 cubic yards of material was \$298,211.40.

Denies that the cost of removing 190,330 cubic yards of material was \$13,779.89.

Denies that the cost of the same work at the price for which the defendant contracted to do would have been \$246,490.35.

Denies that this defendant contracted to do the same work that was done by the North American Dredging Company.

Denies that by the difference between the amount paid by the Government to the North American Dredging Company, and the amount

that would have been paid to this defendant had he carried out the alleged contract according to the terms thereof, is the sum of \$65,500.94.

Denies that the plaintiff has done and performed all the conditions and stipulations, or done or performed any of the conditions
28 or stipulations, on its part to be done or performed.

Denies that by reason of this defendant's failure to carry out his contract, or by reason of this defendant's failure in any particular, or in any manner whatever, this plaintiff was compelled to pay, or did pay, the sum of \$65,500.94, or any sum whatever, more than it would have cost the plaintiff had this defendant carried out his contract according to its terms and conditions.

Denies that by reason of the failure of this defendant to carry out his contract, or by reason of his failure in any particular, the plaintiff has been damaged in the sum of \$65,500.94, or damaged in any sum whatever.

And for a further answer and defense to said complaint this defendant alleges:

That heretofore, to wit, on the twenty-first day of November, 1902, he, this defendant, and W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, made and entered into a written contract, wherein the said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, was and is the party of the first part, and he, this defendant, was and is the party of the second part, and wherein and whereby the said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, as the said party of the first part, for and in behalf of the United States of America, and he, this defendant, covenanted and agreed with each other, that he, this defendant, would do such dredging in San Pablo Bay, California,

as might be required by the said W. H. Heuer, in accordance
29 with certain specifications annexed to said contract, and that the said W. H. Heuer, or his successor, would pay to this defendant, as the party of the second part to said contract, the sum of \$.11-48/100 per cubic yard for all such dredging as should be done in strict accordance with said specifications, and as ordered and accepted by said W. H. Heuer, or his agent.

That in and by said contract and specifications the work agreed by this defendant to be done was to excavate a channel through a shoal in San Pablo Bay, in California, with a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet extending from Pinole Point to Lone Tree Point, and distant from one and a quarter to one and a half statute miles northwest of said points, and to deposit the material taken from the bottom of the bay in making said channel as near the south shore as practicable within lines drawn between said Pinole Point and Lone Tree Point, at such place as should be designated by the Engineer officer in charge, and to impound the said material between bulkheads or dykes of suitable construction, subject to the approval of the Engineer officer in charge, and which said bulkheads or dykes were required by said con-

tract to be built and maintained at the expense of the contractor during the life of the contract.

That defendant was induced to enter into said contract by the misrepresentation and fraud of the party of the first part thereto.

29 That the said specifications in and by said contract referred to and annexed thereto had, prior to said second day of November, 1902, been prepared by said W. H. Heuer, acting as the agent and for and on behalf of the plaintiff herein, as the bases upon which bidders, and particularly this defendant, should fix the price or sum per cubic yard of material (designated in said specification as "spoil") for which they, and particularly this defendant, would do the work specified in said specifications as to the work done, and said specifications described the work to be done, the location of the proposed channel, and the place where the material or "spoil" to be taken from the bottom of San Pablo Bay in dredging said channel was to be deposited, and the condition as to the area and width of the place where said material or "spoil" was to be deposited, and the depth of water therein.

That in and by the 35th paragraph of said specifications it was by said W. H. Heuer represented and stated to this defendant that "the shoal to be dredged is in San Pablo Bay, California; is about five miles in length and as a least depth of nineteen feet at low water. It extends from Pinole Point to Lone Tree Point, and is distant one and a quarter to one and a half statute miles northwest of the points referred to; the average depth of the excavation is about nine feet."

That in and by the 36th paragraph of said specifications it was by said W. H. Heuer represented and stated to this defendant that "the work to be done is to excavate a channel through the shoal, to
30 have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of 27,000 feet; to deposit the spoil as near the south shore as practicable within lines drawn between Pinole Point and Lone Tree Point, at such places as may be designated by the Engineer officer in charge; and to impound the material behind bulkheads or dykes of suitable construction, subject to the approval at and by the expense of the contractor during the life of the contract."

That the only practicable method of doing such work was to lift the material or "spoil" to be removed from the course of the proposed channel along the bottom of the bay by means of a dredger, to load said material or "spoil" upon barges or scows, to transport said material or "spoil" on said dredges or scows to the place of deposit, and there deposit it behind the bulkheads or dykes provided in said specifications to be built and maintained by the contractor, and in order to accomplish said work it was necessary that the place of deposit wherein the material or "spoil" was required to be deposited should have a sufficient area in width and depth to float the barges or scows when loaded with said material or "spoil," to receive the said material or "spoil" from the scows, and to enable persons operating said barges or scows to remove them from said

place of deposit when unloaded. That the said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, knew that the work of depositing and impounding said material or "spoil"

32 in the place designated would not be practicable unless there was sufficient area in width, and a sufficient depth of water in the said place where said material or "spoil" was to be deposited to unload the barges or scows therein, and to receive the material to be taken from the line of the proposed channel. That said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, did, before said contract was made, and for the purpose of inducing this defendant to enter into said contract, represent and state to this defendant that the width of the area between said Pinole Point and said Lone Tree Point available for the depositing of said material from scows had an average width of three-quarters of a mile, with a depth therein of from seven to nine feet of water at mean low water, and said W. H. Heuer at said time exhibited to this defendant maps and surveys of said place of deposit, purporting to be made by and for the plaintiff herein, showing thereon such depth of water over said area.

That this defendant believed said representations so made by said W. H. Heuer to be true, and relied upon said representations as true, and so believing and relying, this defendant was induced by said W. H. Heuer to and did enter into said contract to do the work specified in said specifications for said sum as hereinbefore alleged.

That said representations so made by said W. H. Heuer of and concerning the average width of area available for the deposit of material from scows, and said representations of and concerning

33 the depth of water therein at mean low water, were false and untrue, and were known by said W. H. Heuer to be false and untrue when made by him to this defendant as aforesaid.

That the width of the area available for the deposit of material within the lines drawn between Pinole Point and Lone Tree Point at such places as were designated by the Engineer officer in charge of said work, did not exceed 600 feet, and the depth of water within said lines did not exceed two feet at mean low water, and said area was wholly inadequate for the handling of said scows therein, and said depth of water was too shallow to float said scows in when loaded, or to be used by this defendant in the prosecution of said work as a place of deposit for said spoil.

That this defendant would not have entered into said contract to do said work for said price or sum, or for any price or sum whatever, had he at the time when said contract was made known the truth of or concerning the width of the area available for the deposit of said material or "spoil," or the truth of or concerning the depth of water within said lines drawn from said Pinole Point to Lone Tree Point, but this defendant was at said time misled and deceived by said false and fraudulent representations so made as aforesaid by said W. H. Heuer, as to the width of the area available for the deposit of said material or "spoil," and as to the depth

of water therein, and being so deceived and misled, made and entered into said contract as aforesaid.

And for a further answer and defense to said complaint this defendant alleges:

That heretofore, to wit, on the twenty-first day of November, 1902, he, this defendant, and W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, made and entered into a written contract, wherein the said W. H. Heuer, lieutenant-colonel, Corps of Engineers, United States Army, was and is the party of the first part, and he, this defendant, was and is the party of the second part, and wherein and whereby the said W. H. Heuer, lieutenant-colonel, Corps of Engineers, United States Army, as the said party of the first part, for and in behalf of the United States of America, and he, this defendant covenanted and agreed with each other, that he, this defendant, would do such dredging in San Pablo Bay, California, as might be required by the said W. H. Heuer in accordance with certain specifications annexed to said contract, and that the said W. H. Heuer, or his successor, would pay to this defendant, as the party of the second part to said contract, the sum of \$.11-48/100 per cubic yard for all such dredging as should be done in strict accordance with said specifications, and as ordered and accepted by said W. H. Heuer, or his agent.

That in and by said contract and specifications the work agreed by this defendant to be done was to excavate a channel through a shoal in San Pablo Bay, in California, with a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet, extending from Pinole Point to Lone Tree Point, and distant from one and a quarter to one and a half statute miles northwest of said points, and to deposit the material taken from the bottom of the bay in making said channel as near the

south shore as practicable within lines drawn between said Pinole Point and Lone Tree Point, at such place as should be designated by the Engineer officer in charge, and to impound the said material behind bulkheads or dykes of suitable construction, subject to the approval of the Engineer officer in charge, and which said bulkheads or dykes were required by said contract to be built and maintained at the expense of the contractor during the life of the contract.

That in and by the 39th paragraph of said specifications it was provided that all dredged material was to be deposited within the limits of the area described in paragraph 36 of said specifications. The method of deposit to be subject to the approval of the engineer officer in charge, and said paragraph 36 of said specifications provided that the work to be done was to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of 27,000 feet; to deposit the "spoil" as near the south shore as practicable within lines drawn between Pinole Point and Lone Tree Point at such places as might be designated by

the engineer officer in charge; and to impound the material behind bulkheads or dykes of suitable construction, subject to the approval of the engineer officer in charge, which bulkheads were required to be *built maintained* by and at the expense of the contractor during the life of the contract.

That in and by the 40th paragraph of said specifications it was represented and stated that the part of the area available for the deposit of material from scows had an average width of about three-quarters of a mile. That its distance from the site of
36 dredging varied from one to two miles, and that the location of the place of deposit, the depth of water therein, and the location of the dredging were shown on maps on file in the office of said W. H. Heuer, lieutenant-colonel, Corps of Engineers, United States Army. That in and by section 31 of said specifications it was and is provided that the contractor, to wit, defendant herein, would be required to commence said work within sixty days after notification of the approval of the contract by the Chief of Engineers, United States Army, and completed within twenty-eight months after the date of commencement; and by section 46 of the said specifications it was provided that the work must progress at the rate of at least 100,000 cubic yards per month, and to entitle the contractor, to wit, this defendant, to monthly payments, provided for in paragraph 30 of the specifications, an average of not less than 100,000 cubic yards per month must have been dredged and deposited. That said section 30 of said specifications provided that payments would be made monthly subject to the provisions of paragraph 46 of the said specifications. A percentage of ten per cent per month to be reserved from each payment as provided in paragraph 45 of the said specifications.

That after said contract was signed, and within sixty days after the date of notification of approval of the contract by the Chief of Engineers, United States Army, this defendant, assembled in San Pablo Bay, at great cost to him, and on the line of the proposed channel, a large and complete dredger plant, capable of doing
37 the work as represented to this defendant by said W. H.

Heuer and said specifications. That the only practicable method of doing said work was to lift the material or spoil from the course of the proposed channel along the bottom of the bay by means of a dredger, to load said material or "spoil" upon barges or scows, to transport said material or spoil on said barges or scows to the place of deposit and there deposit it behind the bulkheads or dykes required in said specifications to be built and maintained by the contractor, and in order to deposit said material or spoil behind said bulkheads or dykes it was necessary that there should be a sufficient width or area for a steamer to tow said barges or scows in a sufficient depth of water therein in which said steamboat and barges and scows would float when loaded.

That in assembling said plan to do said work this defendant purchased and procured a number of large and commodious self-dumping

scows, capable of being quickly loaded with and unloaded of great quantities of material or "spoil," and a steamboat to tow and handle said scows in transporting said material or "spoil"; that said scows and steamboat were not too large and did not draw too much water when loaded for the work proposed to be done, and were proper for doing the work contracted to be done under the conditions represented by said specifications and said W. H. Heuer to exist.

That said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, the party of the first part to said contract, was the officer in charge of said work, and who by said contract was to designate the lines between said Pinole Point and said Lone Tree Point upon which said bulkheads or dykes should be built by defendant.

That when this defendant assembled said plant in San Pablo Bay preparatory to doing said work contracted to be done by him as aforesaid, he, this defendant, applied to the said W. H. Heuer, as the Engineer Officer in charge, to designate the lines between said Pinole Point and said Lone Tree Point within which to build the said bulkheads or dykes required by said contract to be built, constructed, and maintained by this defendant, and the said W. H. Heuer did designate the lines upon which said bulkheads or dykes should be built, and thereafter this defendant, at great expense, built, constructed, and maintained said bulkheads or dykes at said places. That after said bulkheads or dykes were so built and constructed, and while being maintained by defendant as required by said contract, and while defendant was actively, energetically, and diligently prosecuting the work agreed by him to be done under said contract, the area enclosed within said bulkheads or dykes within which said contract required this defendant to deposit the said material or spoil became shoaled by reason of the deposit therein by the tides of loose silt and detritus contained in the waters which flowed from the Sacramento and San Joaquin Rivers and the Suisun and San Pablo Bays into said basin and was there deposited. That said silt and detritus was caused to settle therein by the still waters therein by said bulkheads or dykes, and after they were so built and constructed said loose

silt and detritus settled so rapidly within said basin that the bottom thereof filled up and the depth of water decreased so that it was impossible to navigate said steamboat, or any steamboat therein, or to float the said barges or scows, or any barges or scows therein when loaded. That the further performance of said contract by the deposit of said material or spoil within said lines drawn between said Pinole Point and Lone Tree Point and behind said bulkheads or dykes and the impounding of said material therein was rendered impossible by an irresistible and superhuman cause, which this defendant had not power to overcome, to wit, the shoaling of the water in said basin by the deposit of said silt and detritus.

And for a further answer and defense to said complaint this defendant alleges:

That heretofore, to wit, on the twenty-first day of November, 1902, he, this defendant, and W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, made and entered into a written contract, wherein the said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, was and is the party of the first part, and he, this defendant, was and is the party of the second part, and wherein and whereby the said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, as the said party of the first part, for and in behalf of the United States of America, and he, this defendant, covenanted and agreed with each other, that he, this defendant, would do such dredging in San Pablo Bay, California, as might be required by the said W. H. Heuer in accordance with certain specifications annexed to said contract, and part to said contract, the sum of \$.11-48/100 per cubic pay to this defendant, as the party of the second; that the said W. H. Heuer, or his successor, would yard for all such dredging as should be done in strict accordance with said specifications, and as ordered and accepted by said W. H. Heuer, or his agent.

That in and by said contract and specifications the work agreed by this defendant to be done was to excavate a channel through a shoal in San Pablo Bay, in California, with a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet extending from Pinole Point to Lone Tree Point and distant from one and a quarter to one and a half statute miles northwest of said points and to deposit the material taken from the bottom of the bay in making the channel as near the south shore as practicable within lines drawn between said Pinole Point and Lone Tree Point, at such place as should be designated by the Engineer officer in charge, and to impound the said material between bulkheads or dykes of suitable construction, subject to the approval of the Engineer officer in charge, and which said bulkheads or dykes were required by said contract to be built and maintained at the expense of the contractor during the life of the contract.

That in and by said contract it was provided and agreed that if in the judgment of the Engineer in charge the party of the second part therein, to wit, this defendant, should fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of the contract, then the party of the first part, to wit, the said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, or his successor, legally appointed, should have the power with the sanction of the Chief of Engineers, to annul the contract by giving notice in writing to that effect to the party of the first part therein, to wit, this defendant, and upon the giving of such notice all payments to the party of the second part, under said contract, should cease, and all money or reserve percentage due, or to become due the party of the second part by reason of said contract until the final completion and acceptance of the work therein stipulated to be done; and the United States should have the right to

recover from the party of the second part, to wit, this defendant whatever sums might be expended by the party of the first part in completing the said contract in excess of the price therein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection *an* superintendence incurred by said United States in excess of those payable by the said United States during the period in said contract allowed for the completion of the contract by the party of the second part to said contract, to wit, this defendant, and it was further provided in and by said contract that the party of the first part to said contract, to wit, the said W. H. Heuer, might deduct all the above-mentioned sums out of or from the money or reserve percentage retained under the provisions of said contract, and that upon the giving of the said notice, the party of the first part to said contract, to wit, said W. H. Heuer, should be authorized to proceed to secure the performance of the work by contract, or otherwise, in accordance with law.

And in and by said contract it was further provided and agreed that if, at any time during the prosecution of the work, it should be found advantageous or necessary to make any change or modification in the project, and such change or modification should involve such change in the specifications as to character and quantity, whether of labor or material as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reason for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and it was further provided that before taking effect, it must be approved by the Secretary of War; and it was further expressly provided therein that no payment should be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

That said provision was set forth in said contract as follows, to wit:

"If at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether labor or material as would either increase or diminish the cost of the work,

then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reason for such change and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War; provided, that no payments shall be made unless supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred."

That on or about the 24th day of December, 1904, the said W. H. Heuer did, with the sanction of the Chief of Engineers, annul said contract.

That thereafter on or about the 21st day of June, 1904, the said W. H. Heuer, colonel, Corps of Engineers, United States Army, made and entered into a written contract wherein the said W. H. Heuer, colonel, Corps of Engineers, United States Army, was and is the party of the first part, and the North American Dredging Company, a corporation, was and is the party of the second part, and wherein and whereby said W. H. Heuer, colonel, Corps of Engineers, United States Army, as the said party of the first part, for and in behalf of the United States of America, and the said North American Dredging Company covenanted and agreed with each other that the said North American Dredging Company would do such dredging in San Pablo Bay, California, as might be required by said W. H. Heuer in accordance with certain specifications annexed to said contract, and that the said W. H. Heuer or his successor, would
44 pay to said North American Dredging Company, as the party of the second part to said contract, the sum of \$14-48/100 per cubic yard for all such dredging as should be done in strict accordance with the said specifications, and as ordered and accepted by said W. H. Heuer or his agent.

That in and by said contract and specifications the work agreed by said North American Dredging Company to be done was to excavate a channel through a shoal in San Pablo Bay, California, with a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet, extending from Pinole Point to Lone Tree Point, and distant from one and a quarter to one and a half statute miles northwest of said point, and to deposit the "spoil" in water exceeding fifty feet in depth lying within the area bounded by lines drawn from "The Sisters" to Point San Pablo, thence to Marin Islands, and thence back to "The Sisters."

That in making said contract, the said W. H. Heuer did change and modify the project, in this: That instead of depositing the material taken from the bottom of the bay in making said channel as near the south shore as practicable within lines drawn between said Pinole Point and said Lone Tree Point at such place as should be designated by the engineer officer in charge, and impounding said material between bulkheads or dykes of suitable construction, subject to the approval of the engineer officer in charge, to be built and maintained at the expense of the contractor during the life of the contract, the material or "spoil" was to be deposited in water exceeding fifty
45 feet in depth lying between the area bounded by lines drawn from the Sisters to Point San Pablo, thence to Marin Islands, and thence back to the Sisters. That said change and modification involved such change in the specifications as to the character of the work as to greatly increase the cost thereof, and said change and modification was material.

That such change and modification was not agreed upon in writing or otherwise, or at all, by the contracting parties, to wit, by said W. H. Heuer, as the party of the first part to said contract, and this defendant, as the party of the second part thereto, nor by plaintiff

herein and this defendant. That no agreement setting forth fully the reason for such change and giving clearly quantities and prices of both material and labor thus substituted for those named in the original contract was made by or between the parties, and no such agreement was ever approved by the Secretary of War.

That after said contract was made by and between said W. H. Heuer and said North American Dredging Company said North American Dredging Company proceeded to and did excavate a channel through said shoal and did deposit the "spoil" in water exceeding fifty feet in depth lying between the area bounded by lines drawn from the Sisters to Point San Pablo, thence to Marin Islands, and thence back to the Sisters, and said North American Dredging Company did not deposit, nor did any other person or corporation deposit, any part of said material or "spoil" as near the south shore as practicable within lines drawn between said Pinole Point
46 and Lone Tree Point at the place designated by the Engineer officer in charge, or impound the said material between bulkheads or dykes of suitable construction or otherwise, as provided for and required by the contract made between the said W. H. Heuer and this defendant.

And for a further answer and defense to said complaint this defendant alleges:

That heretofore, to wit, on the twenty-first day of November, 1902, he, this defendant, and W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, made and entered into a written contract wherein the said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, was and is the party of the first part, and he, this defendant, was and is the party of the second part, and wherein and whereby the said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, as the said party of the first part, for and in behalf of the United States of America, and he, this defendant, covenanted and agreed with each other that he, this defendant, would do such dredging in San Pablo Bay, California, as might be required by the said W. H. Heuer in accordance with certain specifications annexed to said contract, and that the said W. H. Heuer, or his successor, would pay to this defendant, as the party of the second part to said contract, the sum of \$11-48/100 per cubic yard for all such dredging as should be done in strict accordance with said specifications and as ordered and accepted by said W. H. Heuer or his agent.

That in and by said contract and specifications the work
47 agreed by this defendant to be done was to execute a channel through a shoal in San Pablo Bay, in California, with a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet extending from Pinole Point to Lone Tree Point, and distant from one and a quarter to one and a half statute miles northwest of said points, and to deposit the material taken from the bottom of the bay in making said channel as near the south shore as practicable within lines drawn between said Pinole Point and Lone Tree Point, at such place as should be designated by

the Engineer officer in charge, and to impound the said material between bulkheads or dykes of suitable construction, subject to the approval of the Engineer officer in charge, and which said bulkheads or dykes were required by said contract to be built and maintained at the expense of the contractor during the life of the contract.

That in and by the 39th paragraph of said specifications it was provided that all dredged material was to be deposited within the limits of the area described in paragraph 36 of said specifications. The method of deposit to be subject to the approval of the Engineer officer in charge, and said paragraph 36 of said specifications provided that the work to be done was to excavate a channel through the shoal, to have a bottom of 300 feet, a depth of 30 feet at mean low water, and a length of 27,000 feet; to deposit the "spoil" as near the south shore as practicable within lines drawn between Pinole Point and Lone Tree Point at such places as might be designated by the Engineer officer in charge; and to impound the
48 material behind bulkheads or dykes of suitable construction, subject to approval by the Engineer officer in charge, which bulkheads were required to be built and maintained by and at the expense of the contractor during the life of the contract.

That in and by the 40th paragraph of said specifications it was represented and stated that the part of the area available for the deposit of material from scows had an average width of about three-quarters of a mile. That its distance from the site of dredging varied from one to two miles, and that the location of the place of deposit, the depth of water therein, and the location of the dredging were shown on maps on file in the office of said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army.

That in and by section 31 of said specifications it was and is provided that the contractor, to wit, this defendant, would be required to commence said work within sixty days after notification of the approval of the contract by the Chief of Engineers, United States Army, and completed within twenty-eight months after the date of commencement; and by section 46 of the said specifications it was provided that the work must progress at the rate of at least 100,000 cubic yards per month, and to entitle the contractor, to wit, this defendant, to monthly payments, provided for in paragraph 30 of the specifications, an average of not less than 100,000 cubic yards per month must have been dredged and deposited. That said section 30 of said specification provided that payments would be made
49 monthly subject to the provisions of paragraph 46 of the said specifications. A percentage of ten per cent per month to be reserved from each payment as provided in paragraph
45 of the said specifications.

That after said contract was signed, and within sixty days after the date of notification of approval of the contract by the Chief of Engineers, United States Army, this defendant assembled in San Pablo Bay, at great cost to him, and on the line of the proposed channel, a large and complete dredger plant, capable of doing the work as represented to this defendant by said W. H. Heuer and said

specifications. That the only practical method of doing said work was to lift the material or "spoil" from the course of the proposed channel along the bottom of the bay by means of a dredger, to load said material or "spoil" upon barges or scows, to transport said material or "spoil" on said barges or scows to the place of deposit and there deposit it behind the bulkheads or dykes required in said specifications to be built and maintained by the contractor, and in order to deposit said material or "spoil" behind said bulkheads or dykes it was necessary that there should be a sufficient width of area for a steamer to tow said barges or scows in, and sufficient depth of water therein in which said steamboat and barges and scows would float when loaded. That in assembling said plant to do said work, this defendant purchased and procured a number of large and commodious self-dumping scows, capable of being quickly loaded and unloaded of great quantities of material or "spoil," and a steamboat to tow and handle said scows in transporting said material or "spoil"; that said scows and steamboat were not too large and did not draw too much water when loaded, for the work proposed to be done, and when proper for doing the work contracted to be done under the conditions represented by said specifications and said W. H. Heuer to exist.

That said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, the party of the first part to said contract, was the Engineer officer in charge of said work and the persons named in said contract to designate the lines between said Pinole Point and said Lone Tree Point upon which said bulkheads or dykes should be built by defendant.

That at the time when said contract was made and entered into, and at all times while this defendant was engaged on said work, said W. H. Heuer was openly hostile and unfriendly to this defendant, and said W. H. Heuer, at various times while this defendant was faithfully and diligently proceeding with said work, impeded and delayed the work with the intent to prevent this defendant from carrying out said contract and performing the work therein agreed by him to be done, and said W. H. Heuer at said time, and at various times while defendant was engaged in performing said work, declared that he intended to make defendant lose money on said contract, and that he would by means of said contract ruin this defendant. That said W. H. Heuer, at the time when said contract was made with this defendant, formed a plan to prevent defendant from carrying on the work agreed by him to be done and to ruin this defendant by preventing the performance of said work. That at the time when this defendant applied to said W. H. Heuer, as the Engineer officer in charge, to designate the lines between said Pinole Point and said Lone Tree Point within which to build the said bulkheads or dykes required by said contract to be built, constructed and maintained by this defendant, he, the said W. H. Heuer, in pursuance of said plan to impede and delay this defendant and prevent this defendant from doing said work, designated the lines at such places on said points of said Pinole Point

and Lone Tree Point that when said bulkheads or dykes were built, the area enclosed therein available for the deposit of material or "spoil" from scows was such that it would shoal and fill up from the silt and detritus that would be deposited therein and said area did thereafter fill up from said silt and detritus.

That said W. H. Heuer, as such Engineer officer in charge of said work, so designated the said lines between said place on Pinole Point and said place on Lone Tree Point upon which he required this defendant to construct said bulkheads or dykes, and behind which said material or "spoil" was to be impounded so as to restrict this defendant in his operations, and to hinder, impede, and delay him in the performance of the work agreed to be done, and said action of said W. H. Heuer did restrict this defendant in said operations and did hinder, impede, and delay this defendant in said work, and in particular in this, that this defendant's barges and scows when loaded could not be floated into or unloaded in said basin, except at
52 extreme high tide, and this defendant was compelled each day to cease operations after loading said scows with said material or "spoil" for the return of the next day's high tide, so that they might be taken into said basin and unloaded.

That said specifications provided in the 41st paragraph thereof that all material dredged and not deposited as directed by the Engineer officer in charge, or any unauthorized dumpage, must be properly disposed of when required by the Engineer officer in charge.

That the impossibility of floating said scows in said basin greatly impeded and hindered this defendant in carrying on said work, and this defendant, when he discovered that said basin was filling up from the silt and detritus flowing from said rivers and bays as aforesaid, and that the depth of water therein was insufficient to float said barges, scows and steamboat in, applied to the said W. H. Heuer for his permission, as Engineer officer in charge, to deposit said material or "spoil" at some other place than behind said bulkheads or dykes, and this defendant at said time showed to said W. H. Heuer that it was impossible to float said barges and scows and steamboat within said area because of the restricted place and shallow water therein, and that he would be ruined if he could not deposit said material or "spoil" at some other place.

That said W. H. Heuer refused to grant to this defendant permission to deposit said material or "spoil" at any other place than behind said bulkheads or dykes within said points between said
53 Pinole Point and said Lone Tree Point, and behind said bulkheads or dykes as built and constructed by this defendant as aforesaid, where the said W. H. Heuer well knew that this defendant could only take said scows at extremely high tide, and said W. H. Heuer at said time, and at other times, declared to this defendant and to others that he intended to make said defendant deposit said material or "spoil" behind said bulkheads or dykes as built, constructed and maintained by him between said point at Pinole Point and said point at Lone Tree Point, and that he intended to make him lose money in doing so and thereby ruin him.

That after the said W. H. Heuer so determined to prevent this defendant from doing said work and so expressed himself, he did in every possible manner retard, delay, and hinder this defendant in the prosecution of the work contracted by him to be done, and in pursuance of said purpose the said W. H. Heuer did order this defendant to dredge said channel in places where the debris was thin and but a small portion of the material necessarily removed would be paid for, and where this defendant was to remove large quantities of material or "spoil" without removing any considerable quantity of material or "spoil" that would be measured in averaging up the quantity to be credited to this defendant's contract, and by refusing to take into account the unusual and abnormal forces and violence of the elements which prevailed in San Pablo Bay and caused delay, and by many other acts prevented this defendant from performing said contract and by finally unjustifiably annulling said contract.

54 That said acts of said W. H. Heuer were not caused by this defendant, and said annulment of defendant's contract by said W. H. Heuer was not caused by any delinquency or failure of this defendant, and said annulment was not made in good faith by said W. H. Heuer, as the Engineer officer in charge, but said contract was annulled by said W. H. Heuer in bad faith, with the intent and for the purpose of further impeding and delaying this defendant and carrying out his declared purpose of ruining him.

Wherefore, this defendant demands that he be hence dismissed with his costs.

AITKEN & AITKEN,
Attorneys for Rudolph Axman.

Due service of the within answer, by copy received, admitted this 15th day of January, 1907.

ROBT. T. DEVLIN,
U. S. District Attorney.

[Endorsed:] Filed January 15, 1907. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} No. 13,914.
<i>vs.</i>	
RUDOLPH AXMAN AND AMERICAN BONDING COMPANY of Baltimore (a corporation), defendants.	

55 Answer of American Bonding Company of Baltimore.

Now comes defendant American Bonding Company of Baltimore, and for answer to plaintiff's complaint herein:

I.

Denies generally and specifically all of the allegations of said complaint, and all of the matters and things therein alleged, other than those contained in Paragraph 1 thereof.

II.

And for a further and separate answer and defence, this defendant alleges that it is informed and believes, and upon such information and belief denies that on the 22d, or any day, of November, 1902, or on any day, or at any time, at the city and county of San Francisco, or elsewhere, defendant Axman entered into a certain contract or agreement, in writing or otherwise, with W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, acting on behalf of the United States of America, wherein and whereby, or wherein or whereby, he, for himself, his heirs, executors, and administrators, or for himself, or his heirs, or executors, or administrators, or either or any of them, did covenant and agree, or covenant or agree, that said Axman would do such dredging in San Pablo Bay, California, as might be required by the said W. H. Heuer in accordance with certain specifications, or any specifications, which were and are attached to the said, or any, contract and agreement, or were or
56 are attached to the said or any contract, or made a part thereof, at the rate of \$.1144 per cubic yard for all of such dredging as should be done in strict accordance with the said specifications attached to said contract, or at any rate per cubic yard for all or any of such dredging as should be done in strict or any accordance with said or any such specifications.

III.

And for the same reason and upon the same ground, it denies that by the terms of his said contract, and in accordance with the specifications attached to and made a part of it, or by the terms of any contract made or entered into as alleged by plaintiff, defendant Axman agreed to dredge a channel through the shoal in San Pablo Bay, extending from Pinole Point to Lone Tree Point.

IV.

And for the same reason and upon the same ground, it denies that the channel so to be dredged was to have a bottom width of 300, or any number of, feet or a depth of 30, or any number of, feet at mean low water, or a length of about 27,000, or any number of, feet.

V.

And for the same reason and upon the same ground, it denies that by the terms of said contract or in accordance with the specifications attached to and made a part of it, all or any material above a depth of thirty, or any number of, feet was to be removed in accordance with the requirements of the Engineer officer in charge, or that the
57 side slopes of said channel were to be three horizontal to one vertical along the lines of the proposed completed channel.

VI.

And for the same reason and upon the same ground, it denies that by said contract, or by any contract alleged in said complaint to have been made or entered into by defendant Axman, there was to be paid one-half of the full contract rates for all material shown in the final survey to have been removed from between the depths of 30 and 31 feet in the said channel, in addition to the contract price of material excavated above the thirty-foot mark at mean low water.

VII.

And for the same reason and upon the same ground, it denies that said contract contained, among other terms and conditions, the paragraph quoted and recited in plaintiff's complaint, as follows:

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties or either of them) of the second part, and upon the giving of such notice all payments to

the party or parties of the second part under this contract shall
58 cease, and all money or reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise in accordance with law."

VIII.

And for the same reason and upon the same ground, it denies that to guarantee the faithful performance of the contract, or the completion of said contract alleged in plaintiff's complaint to have been

made by defendant Axman, the defendant Axman gave a bond signed by him and the American Bonding Company of Baltimore, Maryland, on the 21st or any day of November, 1902, in the penal
59 sum of \$50,000, or any sum whatever, wherein or whereby the defendants bound themselves, their heirs, executors, administrators, and successors, or bound either of themselves, or the heirs, or the executors, or the administrators, or the successors of either of them, jointly and severally, or jointly or severally, or otherwise, or at all, or in which the condition of said bond or said obligation was: "That whereas, the above-bounden Rudolph Axman has, on the 21st day of November, 1902, entered into a contract with the United States represented by lieutenant colonel W. H. Heuer, Corps of Engineers, United States Army, for dredging in San Pablo Bay, California; now, therefore, if the above-bounden Rudolph Axman, his heirs, executors, or administrators, shall and will in all respects duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by the said contract agreed and covenanted by said Rudolph Axman to be observed and performed, according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States during the original term of the same, and shall promptly make full payments to all persons supplying him with labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue."

IX.

And for the same reason and up the same ground, it denies that defendant Axman, ever did enter upon the performance of
60 the contract alleged in said complaint to have been made, and denies that said Axman proceeded to do any work whatever thereunder.

X.

And for the same reason and upon the same ground, it denies that defendant Axman, did fail to prosecute faithfully, or diligently, the work in accordance with the specifications and requirements of said contract.

XI.

And for the same reason and upon the same ground, it denies that he did refuse to complete or perform the same.

XII.

And for the same reason and upon the same ground, it denies that he refused to complete or perform any further part thereof.

XIII.

And for the same reason and upon the same ground, it denies that defendant Axman did abandon said contract or refuse to do the work in said contract provided for, or did refuse to do any part thereof.

XIV.

And for the same reason and upon the same ground, it denies that by reason of said Axman's alleged failure to carry out the terms of the said contract and to comply with the specifications thereof or by reason of said Axman's alleged violation of the provisions of the said contract, or by reason of said Axman's alleged failure to carry out the terms of any contract whatever, or by reason of the said

61 Axman's alleged failure to comply with the specifications of any contract, or by reason of said Axman's alleged violation of the provisions of the said or any contract whatever, the said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States of America, acting on behalf of the United States of America, did, on the 24th or any day of December, 1903, or on any day whatever, with the sanction of the Chief of Engineers, or otherwise annul the said contract by giving notice in writing to that effect to the defendants herein, or to each or either of them, in accordance with the provisions of said contract, or otherwise, or at all.

XV.

And for the same reason and upon the same ground, it denies that the work was readvertised after the alleged annulment of the contract.

XVI.

And for the same reason and upon the same ground, it denies that a contract was made with the North American Dredging Company of San Francisco, California, or with any company on the 21st, or any day of June, 1904, or on any day whatever to do the, or any, work left undone by the defendants herein, at the rate of \$.1148 per cubic yard, or at any rate whatever.

XVII.

And for the same reason and upon the same ground, it denies that the North American Dredging Company, or any company or persons
62 whosoever, carried out the, or any, work and completed the contract, or completed any contract, on February 10, 1906.

XVIII.

And for the same reason and upon the same ground, it denies that to complete the work after the alleged failure of said Axman to carry

out said contract, it became or was necessary for the North American Dredging Company to remove, 2,059,471 or any cubic yards of material to the 30-foot mark or plane at low water or 190,330 or any cubic yards of material between the 30-foot and the 31-foot marks or planes.

XIX.

And for the same reason and upon the same ground, it denies that the North American Dredging Company did remove 2,059,471 or any cubic yards of material to the thirty-foot plane at low water.

XX.

And for the same reason and upon the same ground, it denies that the North American Dredging Company did remove 190,330 or any cubic yards of material between the 30-foot and the 31-foot marks or planes.

XXI.

And for the same reason and upon the same ground, it denies that the cost of so removing the said 2,059,471 cubic yards of material was \$298,211.40, or any sum whatsoever.

2

XXII.

63 And for the same reason and upon the same ground, it denies that the cost of removing 190,330 cubic yards of material was \$13,779.89, or any sum whatsoever.

XXIII.

And for the same reason and upon the same ground, it denies that the cost of the same work at the price for which said Axman contracted to do the work would have been \$246,490.35.

XXIV.

And for the same reason and upon the same ground, it denies that said Axman contracted to do the same work that was done by the North American Dredging Company.

XXV.

And for the same reason and upon the same ground, it denies that the difference between the amount alleged to have been paid by the Government to the North American Dredging Company, and the amount that would have been paid to said Axman carried out the alleged contract to the terms thereof, is the sum of \$65,500.94, or any sum whatsoever.

XXVI.

And for the same reason and upon the same ground, it denies that the plaintiff has done and performed all the conditions and stipulations, or done or performed any of the conditions or stipulations on its part to be done, or performed.

XXVII.

And for the same reason and upon the same ground, it denies that by reason of said Axman's alleged failure to carry out his contract, or by reason of said Axman's alleged failure in any particular, or in any manner whatever, the plaintiff was compelled to pay, or did pay the sum of \$65,500.94, or any sum whatever, more than it would have cost the plaintiff had said Axman carried out said Axman's contract according to its terms and conditions.

XXVIII.

And for the same reason and upon the same ground, it denies that by reason of the alleged failure of said Axman to carry out said Axman's contract, or by reason of said Axman's alleged failure in any particular, the plaintiff has been damaged in the sum of \$65,500.94, or damaged in any sum whatever.

And for a further and separate answer and defense to said complaint, this defendant alleges that it is informed and believes, and upon such information and belief alleges:

That heretofore, to wit, on the twenty-first day of November, 1902, defendant Axman and W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, made and entered into written contract, wherein the said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, was and is the party of the first part, and said Axman was and is the party of the second part, and wherein and whereby the said W. H. Heuer, lieutenant colonel Corps of Engineers, United States Army, as the said party of the first part, for and in behalf of the United States of America, and said Axman, covenanted and agreed with each other, that defendant Axman would do such dredging in San Pablo Bay, California, as might be required by the said W. H. Heuer in accordance with certain specifications annexed to said contract, and that the said W. H. Heuer, or his successor, should pay to said Axman, as the party of the second part to said contract, the sum of \$.11-48/100 per cubic yard for all such dredging as should be done in strict accordance with said specifications, and as ordered and accepted by said W. H. Heuer, or his agent.

That in and by said contract and specifications the work agreed by said Axman to be done was to excavate a channel through a shoal in San Pablo Bay, in California, with a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000

feet extending from Pinole Point to Lone Tree Point, and distant from one and a quarter to one and a half statute miles northwest of said points, and to deposit the material taken from the bottom of the bay in making said channel as near the south shore as practicable within lines drawn between said Pinole Point and Lone Tree Point, at such place as should be designated by the engineer officer in charge, and to impound the said material behind bulkheads or dykes of suitable construction, subject to the approval of the engineer officer in charge, and which said bulkheads or dykes were required by said contract to be built and maintained at the expense of the contractor during the life of the contract.

That said Axman was induced to enter into said contract by misrepresentation and fraud of the party of the first part thereto.

That the said specifications in and by said contract referred 66 to and annexed thereto had, prior to said second day of November, 1902, been prepared by said W. H. Heuer, acting as the agent and for and on behalf of the plaintiff herein, as the basis upon which bidders, and particularly said Axman, should fix the price or sum per cubic yard of material (designated in said specifications as "spoil") for which they, and particularly said Axman, should do the work specified in said specifications as the work to be done, and said specifications described the work to be done, the location of the proposed channel, and the place where the material or "spoil" to be taken from the bottom of San Pablo Bay in dredging said channel was to be deposited, and the condition as to area and width of the place where said material or "spoil" was to be deposited and the depth of water therein.

That in and by the 35th paragraph of said specifications, it was by said W. H. Heuer represented and stated to said Axman that "the shoal to be dredged is in San Pablo Bay, California, is about five miles in length and has at least depth of nineteen feet at low water. It extends from Pinole Point to Lone Tree Point, and is distant one and a quarter to one and a half statute miles northwest of the points referred to; the average depth of the excavation is about nine feet."

That in and by the 36th paragraph of said specifications, it was by said W. H. Heuer represented and stated to said Axman that "the work to be done is to excavate a channel through the shoal, to 67 have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of 27,000 feet, to deposit the spoil as near the south shore as practicable within the lines drawn between Pinole Point and Lone Tree Point at such places as may be designated by the engineer officer in charge; and to impound the material behind bulkheads or dykes of suitable construction, subject to the approval of the engineer officer in charge, which must be built and maintained at and by the expense of the contractor during the life of the contract."

That the only practicable method of doing such work was to lift the material or "spoil" to be removed from the course of the pro-

posed channel along the bottom of the bay by means of a dredger, to load said material or "spoil" upon barges or scows, to transport said material or "spoil" on said dredges or scows to the place of deposit, and there deposit it behind the bulkheads or dykes provided in said specifications to be built and maintained by the contractor; and in order to accomplish said work it was necessary that the place of deposit wherein the material or "spoil" was required to be deposited should have a sufficient area in width and depth to float the barges or scows when loaded with said material or "spoil," to receive the said material or "spoil" from the scows, and to enable persons operating said barges or scows to remove them from said place of deposit when unloaded. That the said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, knew that the work of depositing and impounding said material or "spoil" in the place designated

68 would not be practicable unless there was a sufficient area in width, and a sufficient depth of water in the said place where said material or "spoil" was to be deposited to unload the barges or scows therein, and to receive the material to be taken from the line of the proposed channel. That said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, did before said contract was made, and for the purpose of inducing said Axman to enter into said contract, represent and state to said Axman that the width of the area between said Pinole Point and said Lone Tree Point available for the depositing of said material from scows had an average width of three-quarters of a mile, with a depth therein of from seven to nine feet of water at mean low water, and said W. H. Heuer at said time exhibited to said Axman maps and surveys of said place of deposit, purporting to be made by and for the plaintiff herein, showing thereon such depth of water over said area.

That said Axman believed said representations so made by said W. H. Heuer to be true, and relied upon said representations as true, and so believing and relying, said Axman was induced by said W. H. Heuer to and did enter into said contract to do the work specified in said specifications for said sum as hereinbefore alleged.

That said representations so made by said W. H. Heuer of and concerning the average width of area available for the deposit of materials from scows, and said representations of and concerning the depth of water therein at mean low water, were false and untrue, and were known by said W. H. Heuer to be false and untrue
69 when made by him to said Axman as aforesaid. That the width of the area available for the deposit of material within the lines drawn between Pinole Point and Lone Tree Point at such places as were designated by the Engineer officer in charge of said work did not exceed 600 feet, and the depth of water within said lines did not exceed two feet at mean low water, and said area was wholly inadequate for the handling of said scows therein, and said depth of water was too shallow to float said scows in when loaded, or to be used by said Axman in the prosecution of said work as a place of deposit for said "spoil."

That said Axman would not have entered into said contract to do said work for said price or sum, or for any price or sum whatever, had he at the time when said contract was made known the truth of or concerning the width of the area available for the deposit of said material or "spoil," or the truth of or concerning the depth of water within said lines from said Pinole Point to Lone Tree Point, but said Axman was at said time misled and deceived by said false and fraudulent representations so made as aforesaid by said W. H. Heuer as to the width of the area available for the deposit of said material or "spoil," and as to the depth of water therein, and being so deceived and misled, made and entered into said contract as aforesaid.

And for a further and separate answer and defense to said complaint, this defendant alleges that it is informed and believes, and upon such information and belief, alleges:

70 That heretofore, to wit, on the twenty-first day of November, 1902, defendant Axman and W. H. Heuer, Lieutenant-Colonel, Corps of Engineers, United States Army, made and entered into a written contract, wherein the said W. H. Heuer, Lieutenant-Colonel Corps of Engineers, United States Army, was and is the party of the first part, and said Axman was and is the party of the second part, and wherein and whereby the said W. H. Heuer, Lieutenant-Colonel, Corps of Engineers, United States Army, as the party of the first part, for and in behalf of the United States of America, and said Axman, covenanted and agreed with each other, that said Axman would do such dredging in San Pablo Bay, California, as might be required by the said W. H. Heuer in accordance with certain specifications annexed to this contract, and that the said W. H. Heuer, or his successor, would pay to said Axman, as the party of the second part to said contract, the sum of \$.11-48/100 per cubic yard for all dredging that should be done in accordance with said specifications, and as ordered and accepted by said W. H. Heuer, or his agent.

That in and by said contract and specifications, the work agreed by said Axman to be done was to excavate a channel through a shoal in San Pablo Bay, California, with a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet, extending from Pinole Point to Lone Tree Point, and distant from one and a quarter to one and a half statute miles northwest of said points,

and to deposit the material taken from the bottom of the Bay in making said channel as near the south shore as practicable within lines drawn between said Pinole Point and Lone Tree Point, at such place as should be designated by the Engineer Officer in charge, and to impound the said material behind bulkheads or dykes of suitable construction, subject to the approval of the Engineer Officer in charge, and which said bulkheads or dykes were required by said contract to be built and maintained at the expense of the contractor during the life of contract.

That in and by the 39th paragraph of said specifications, it was provided that all dredged material was to be deposited within the

limits of the area described in paragraph 36 of said specifications. The method of deposit to be subject to the approval of the Engineer Officer in charge, and said paragraph 36 of said specifications provided that the work to be done was to excavate a channel through the shoal to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of 27,000 feet; to deposit the "spoil" as near the south shore as practicable within lines drawn between Pinole Point and Lone Tree Point at such places as might be designated by the Engineer Officer in charge; and to impound the material behind bulkheads or dykes of suitable construction, subject to the approval by the Engineer Officer in charge, which bulkheads were required to be built and maintained by and at the expense of the contractor during the life of the contract.

That in and by the 40th paragraph of said specifications it was represented and stated that the part of the area available for the deposit of material from scows had an average width of about 72 three-quarters of a mile. That its distance from the site of dredging varied from one to two miles, and that the location of the place of deposit, the depth of water therein, and the location of the dredging were shown on maps of file in the office of said W. H. Heuer, Lieutenant-Colonel, Corps of Engineers, United States Army.

That in and by section 31 of said specifications, it was and is provided that the contractor, to wit, defendant Axman, would be required to commence said work within sixty days after notification of the approval of the contract by the Chief of Engineers, United States Army, and complete it within twenty-eight months after the date of commencement; and by section 46 of the said specifications, it was provided that the work must progress at the rate of at least 100,000 cubic yards per month, and to entitle the contractor, to wit, defendant Axman, to monthly payments, provided for in paragraph 30 of the specifications, an average of not less than 100,000 cubic yards per month must have been dredged and deposited. That said section 30 of said specifications provided that payments would be made monthly subject to the provisions of paragraph 46 of the said specifications. A percentage of ten per cent per month to be reserved from each payment as provided in paragraph 45 of the said specifications.

That after said contract was signed, and within sixty days after the date of notification of approval of the contract by the Chief of Engineers, United States Army, said Axman assembled in San Pablo Bay, at great cost to said Axman, and on the line of 73 the proposed channel, a large and complete dredger plant, capable of doing the work as represented to said Axman by said W. H. Heuer and said specifications. That the only practicable method of doing said work was to lift the material or "spoil" from the course of the proposed channel along the bottom of the bay by means of a dredger, to load said material or "spoil" upon barges or scows, to transport said material or spoil on said barges

or scows to the place of deposit and there deposit it behind the bulkheads or dykes required in said specifications to be built and maintained by the contractor, and in order to deposit said material or "spoil" behind said bulkheads or dykes it was necessary that there should be a sufficient width of area for a steamer to tow said barges or scows in a sufficient depth of water therein in which said steamboat and barges and scows would float when loaded. That in assembling said plant to do said work, said Axman purchased and procured a large number of commodious self-dumping scows, capable of being quickly loaded with and unloaded of great quantities of material or "spoil," and a steamboat to tow and handle said scows in transporting said material or "spoil"; that said scows and steamboat were not too large and did not draw too much water when loaded for the work proposed to be done, and were proper for doing the work contracted to be done under the conditions represented by said W. H. Heuer to exist.

That said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, the party of the first part of said contract was the officer in charge of said work, and who by said
74 contract was to designate the lines between Pinole Point and said Lone Tree Point upon which said bulkheads or dykes should be built by said Axman.

That when said Axman assembled said plant in San Pablo Bay preparatory to doing said work contracted to be done by said Axman as aforesaid, said Axman applied to the said W. H. Heuer, as the Engineer officer in charge, to designate the lines between said Pinole Point and said Lone Tree Point within which to build the said bulkheads or dykes required by said contract to be built, constructed and maintained by said Axman, and the said W. H. Heuer did designate the lines upon which said bulkheads or dykes should be built, and thereafter said Axman, at great expense, built, and constructed and maintained said bulkheads or dykes at said places. That after said bulkheads or dykes were so built and constructed, and while being maintained by defendant Axman as required by said contract, and while said Axman was actively, energetically, and diligently prosecuting said contract, the area enclosed within said bulkheads or dykes within which said contract required said Axman to deposit the said material or "spoil" became shoaled by reason of the deposit therein by the tides of loose silt and detritus contained in the waters which flowed from the Sacramento and San Joaquin Rivers and the Suisun and San Pablo Bays into said basin and was there deposited. That said silt and detritus was caused to
75 settle therein by the still waters therein occasioned by said bulkheads or dykes, and after they were so built and constructed said loose silt and detritus settled so rapidly within said basin that the bottom thereof filled up and the depth of water decreased so that it was impossible to navigate said steamboat, or any steamboat therein, or to float the said barges or scows, or any barges or scows therein when loaded. That the further performance

of said contract by the deposit of said material or "spoil" within said lines drawn between said Pinole Point and Lone Tree Point and behind said bulkheads or dykes and the impounding of said material therein was rendered impossible by an irresistible and superhuman cause, which said Axman had not the power to overcome, to wit, the shoaling of the water in said basin by the deposit of said silt and detritus.

And for a further answer and defence to said complaint, this defendant alleges that it is informed and believes, and upon such information and belief, alleges:

That heretofore, to wit, on the twenty-first day of November, 1902, defendant Axman and W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, made and entered into a written contract, wherein the said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, was and is the party of the first part, and said Axman was and is the party of the second part, and wherein and whereby the said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, as the party of the first part, for and in behalf of the United States of America, and

76 said Axman, covenanted and agreed with each other, that said Axman would do such dredging in San Pablo Bay, California, as might be required by the said W. H. Heuer in accordance with certain specifications annexed to said contract, and that the said W. H. Heuer, or his successor, should pay to said Axman, as the party of the second part to said contract, the sum of \$0.11-48/100 per cubic yard for all such dredging as should be done in strict accordance with said specifications, and as ordered and accepted by said W. H. Heuer, or his agent.

That in and by said contract and specifications, the work agreed by said Axman to be done was to excavate a channel through a shoal in San Pablo Bay, in California, with a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet extending from Pinole Point to Lone Tree Point, and distant from one and a quarter to one and a half statute miles northwest of said points, and to deposit the material taken from the bottom of the bay in making said channel as near the south shore as practicable within lines drawn between said Pinole Point and Lone Tree Point, at such place as should be designated by the engineer officer in charge, and to impound the said material behind bulkheads or dykes of suitable construction, subject to the approval of the engineer officer in charge, and which said bulkheads or dykes were required by said contract to be built and maintained at the expense of the contractor during the life of the contract.

That in and by said contract it was provided and agreed that if in the judgment of the Engineer in charge the party of the 77 second part therein, to wit, defendant Axman, should fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of the contract, then the party of the first part, to wit, the said W. H. Heuer, lieutenant

colonel, Corps of Engineers, United States Army, or his successor legally appointed, should have the power with the sanction of the Chief of Engineers, to annul the contract by giving notice in writing to that effect to the party of the second part therein, to wit, said Axman, and upon the giving of such notice all payments to the party of the second part, under said contract, should cease, and all money or reserved percentage due, or to become due the party of the second part by reason of said contract, should be retained by said party of the first part until the final completion and acceptance of the work stipulated to be done; and the United States should have the right to recover from the party of the second part, to wit, said Axman, whatever sums might be expended by the party of the first part in completing the said contract in excess of the price therein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by said United States in excess of those payable by the said United States during the period in said contract allowed for the completion of the contract by the party of the second part to said contract, to wit, said Axman, and it was further provided in and by said contract, that the party of the first part to said contract, to wit, the said W. H. Heuer, might deduct all the above-mentioned sums out of or from the money or reserved percentage retained under the provisions of said contract, and that upon the giving of the said notice, the party of the first part to said contract, to wit, said W. H. Heuer, should be authorized to proceed to secure the performance of the work by contract, or otherwise, in accordance with law.

And in and by said contract, it was further provided and agreed that, if, at any time during the prosecution of the work, it should be found advantageous or necessary to make any change or modification in the project, and such change or modification should involve such change in the specifications as to character and quantity, whether of labor or material as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth the reason for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and it was further provided that before taking effect, it must be approved by the Secretary of War; and it was further expressly provided therein that no payment should be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

That said provision was set forth in said contract as follows, to wit:

"If at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish

inish the cost of the work, then such change or modification must be agree upon in writing by the contracting parties, the agreement setting forth fully the reason for such change and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War; provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred."

That on or about the 24th day of December, 1903, the said W. H. Heuer did, with the sanction of the Chief of Engineers, annul said contract.

That thereafter, on or about the 21st day of June, 1904, the said W. H. Heuer, colonel, Corps of Engineers, United States Army, made and entered into a written contract wherein the said W. H. Heuer, colonel, Corps of Engineers, United States Army, was and is a party of the first part, and the North American Dredging Company, a corporation, was and is the party of the second part, and wherein and whereby said W. H. Heuer, colonel, Corps of Engineers, United States Army, as the said party of the first part, for and in behalf of the United States of America, and the said North American Dredging Company covenanted and agreed with each other that the said North American Dredging Company would do such

dredging in San Pablo Bay, California, as might be required by said W. H. Heuer, in accordance with certain specifications annexed to said contract, and that the said W. H. Heuer, or his successor, would pay to the said North American Dredging Company, as the party of the second part to said contract, the sum of \$14—48/100 per cubic yard for all such dredging as should be done in strict accordance with the said specifications, and as ordered and accepted by said W. H. Heuer, or his agent.

That in and by said contract and specifications the work agreed by said North American Dredging Company to be done was to excavate a channel through a shoal in San Pablo Bay, California, with a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet, extending from Pinole Point to Lone Tree Point, and distant from one and a quarter to one and a half statute miles northwest of said point, and to deposit the "spoil" in water exceeding fifty feet in depth lying within the area bounded by lines drawn from "The Sisters" to Point San Pablo, thence to Marin Islands, and thence back to "The Sisters."

That in making said contract, the said W. H. Heuer did change and modify the project, in this: that instead of depositing the material taken from the bottom of the bay in making said channel as near the south shore as practicable within lines drawn between said Pinole Point and said Lone Tree Point at such place as should be designated by the Engineer officer in charge, and impounding said material behind bulkheads or dykes of suitable construction, subject to the approval of the Engineer officer in charge, to be built

81 and maintained at the expense of the contractor during the life of the contract, the material or "spoil" was to be deposited in water exceeding fifty feet in depth lying between the area bounded by lines drawn from "The Sisters" to Point San Pablo, thence to Marin Islands, and thence back to "The Sisters." That said change and modification involved such change in the specifications as to the character of the work as to greatly increase the cost thereof, and said change and modification was material.

That such change and modification was not agreed upon in writing or otherwise, or at all, by the contracting parties, to wit, by said W. H. Heuer, as the party of the first part to said contract, and defendant Axman, as the party of the second part thereto, nor by plaintiff herein and said Axman. That no agreement setting forth the reason for such change or giving clearly or at all quantities or prices of either material or labor thus substituted for those named in the original contract was made by or between the parties, and no agreement was ever approved by the Secretary of War.

That after said contract was made by and between said W. H. Heuer and said North American Dredging Company, said North American Dredging Company proceeded to and did excavate a channel through said shoal, and did deposit the "spoil" in water exceeding fifty feet in depth lying between the area bounded by lines drawn from "The Sisters" to Point San Pablo, thence to

Marin Islands, and thence back to "The Sisters," and said
82 North American Dredging Company did not deposit, nor did any other person or corporation deposit any part of said material or "spoil" as near the south shore as practicable within lines drawn between said Pinole Point and Lone Tree Point at the place designated by the Engineer officer in charge, or impound the said material between bulkheads or dykes of suitable construction or otherwise, as provided for and required by the contract made between the said W. H. Heuer and said Axman.

And for a further and separate answer and defence to said complaint, this defendant alleges that it is informed and believes, and upon such information and belief, alleges:

That heretofore, to wit, on the twenty-first day of November, 1902, defendant Axman and W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, made and entered into a written contract, wherein the said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, was and is the party of the first part, and said Axman was and is the party of the second part, and wherein and whereby the said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, as the said party of the first part, for and in behalf of the United States of America, and said Axman, covenanted and agreed with each other that said Axman would do such dredging in San Pablo Bay, California, as might be required by said W. H. Heuer, in accordance with certain specifications annexed to said contract, and that the said W. Heuer,

83 or his successor, would pay to said Axman, as the party of the second part to said contract, the sum of \$.11-48/100 per cubic yard for all such dredging as should be done in strict accordance with said specifications, and as ordered and accepted by said W. H. Heuer, or his agent.

That in and by said contract and specifications, the work agreed by said Axman to be done was to excavate a channel through a shoal in San Pablo Bay, in California, with a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet extending from Pinole Point to Lone Tree Point, and distant from one and a quarter to one and a half statute miles northwest of said points, and to deposit the material taken from the bottom of the bay in making said channel as near the south shore as practicable within lines drawn between said Pinole Point and Lone Tree Point, at such place as should be designated by the Engineer officer in charge, and to impound the said material behind bulkheads or dykes of suitable construction, subject to the approval of the Engineer officer in charge, and which said bulkheads or dykes were required by said contract to be built and maintained at the expense of the contractor during the life of the contract.

That in and by the 39th paragraph of said specifications, it was provided that all dredged material was to be deposited within the officer in charge, and said paragraph 36 of said specifications The method of deposit to be subject to the approval of the Engineer officer in charge, and said paragraph 36 of said specifications

84 provided that the work to be done was to excavate a channel through the shoal, to have a bottom of 300 feet, a depth of 30 feet at mean low water, and a length of 27,000 feet; to deposit the "spoil" as near the south shore as practicable within lines drawn between Pinole Point and Lone Tree Point at such places as might be designated by the Engineer officer in charge; and to impound the material behind bulkheads or dykes of suitable construction, subject to approval by the Engineer officer in charge, which bulkheads were required to be built and maintained by and at the expense of the contractor during the life of the contract.

That in and by the 40th paragraph of said specifications, it was represented and stated that the part of the area available for the deposit of material from scows had an average width of about three-quarters of a mile. That its distance from the site of dredging varied from one to two miles, and that the location of the place of deposit, the depth of water therein, and the location of the dredging were shown on maps on file in the office of said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army.

That in and by section 31 of said specifications, it was and is provided that the contractor, to wit, said Axman, would be required to commence said work within sixty days after notification of the approval of the contract by the Chief of Engineers, United States Army, and complete it within twenty-eight months after the date

of commencement; and by section 46 of the said specifications it was provided that the work must progress at the rate of at least
85 100,000 cubic yards per month, and to entitle the contractor, to wit, said Axman, to monthly payments, provided for in paragraph 30 of the specifications, an average of not less than 100,000 cubic yards per month must have been dredged and deposited. That said section 30 of said specifications provided that payments would be made monthly subject to the provisions of paragraph 46 of the said specifications. A percentage of ten per cent per month to be reserved from each payment as provided in paragraph 45 of the said specifications.

That after said contract was signed, and within sixty days after the date of notification of approval of the contract by the Chief of Engineers, United States Army, said Axman assembled in San Pablo Bay, at great cost to said Axman, and on the line of the proposed channel, a large and complete dredger plant, capable of doing the work as represented to said Axman by said W. H. Heuer and said specifications. That the only practicable method of doing said work was to lift the material or "spoil" from the course of the proposed channel along the bottom of the bay by means of a dredger, to load said material or "spoil" upon barges or scows to transport said material or "spoil" on said barges or scows to the place of deposit, and there deposit it behind the bulkheads or dykes required in said specifications to be built and maintained by the contractor, and in order to deposit said material or "spoil" behind said bulkheads or dykes it was necessary that there should be a sufficient width of area for a steamer to tow said barges or scows in, and sufficient depth
86 of water therein in which said steamboat and barges and scows would float when loaded. That in assembling said plant to do said work, said Axman purchased and procured a number of large and commodious self-dumping scows, capable of being quickly loaded and unloaded of great quantities of material or "spoil," and a steamboat to tow and handle said scows in transporting said material or "spoil"; that said scows and steamboats were not too large and did not draw too much water when loaded, for the work proposed to be done, and were proper for doing the work contracted to be done under the conditions represented by said specifications and said W. H. Heuer to exist.

That said W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, the party of the first part to said contract, was the Engineer officer in charge of said work and the person named in said contract to designate the lines between said Pinole Point and said Lone Tree Point upon which said bulkheads or dykes should be built by defendant Axman.

That at the time when said contract was made and entered into, and at all times while said Axman was engaged on said work, said W. H. Heuer was openly hostile and unfriendly to said Axman, and said W. H. Heuer at various times while said Axman was faithfully

and diligently proceeding with said work, impeded and delayed the work with the intent to prevent said Axman from carrying out said contract and performing the work therein agreed by said Axman to be done, and said W. H. Heuer at said time, and at various
87 times while said Axman was engaged in performing said work, declared that he intended to make said Axman lose money on said contract, and that he would by means of said contract ruin said Axman. That said W. H. Heuer, at the time when the contract was made with said Axman, formed a plan to prevent said Axman from carrying on the work agreed by said Axman to be done and to ruin said Axman by preventing the performance of said work. That at the time when said Axman applied to W. H. Heuer, as the Engineer officer in charge, to designate the lines between said Pinole Point and said Lone Tree Point within which to build the said bulkheads or dykes required by said contract to be built, constructed and maintained by said Axman, he, the said W. H. Heuer, in pursuance of said plan to impede and delay said Axman and prevent said Axman from doing said work, designated the lines at such places on said points of said Pinole Point and Lone Tree Point, that when said bulkheads or dykes were built, the area enclosed therein available for the deposit of material or "spoil" from scows was such that it would shoal and fill up from the silt and detritus that would be deposited therein, and said area did thereafter fill up from said silt and detritus.

That said W. H. Heuer, as such Engineer officer in charge of said work, so designated the lines between said place on Pinole Point and said place on Lone Tree Point, upon which he required said Axman to construct said bulkheads or dykes, and behind which said material or "spoil" was to be impounded, so as to restrict said

Axman in said Axman's operations, and to hinder, impede
88 and delay said Axman in the performance of the work agreed to be done, and said action of said W. H. Heuer did restrict said Axman in said operations, and did hinder, impede, and delay said Axman in said work, and in particular in this, that said Axman's barges and scows when loaded could not be floated into or unloaded in said basin, except at extreme high tide, and said Axman was compelled each day to cease operations after loading said scows with said material or "spoil" for the return of the next day's high tide, so that they might be taken into said basin and unloaded.

That said specifications provided in the 41st paragraph thereof that all material dredged and not deposited as directed by the Engineer officer in charge, or any unauthorized dumpage, must be properly disposed of when required by the Engineer officer in charge.

That the impossibility of floating said scows in said basin greatly impeded and hindered said Axman in carrying on said work, and said Axman, when said Axman discovered that said basin was filling up from the silt and detritus flowing from said rivers and bays aforesaid, and that the depth of water therein was insufficient to float said

barges, scows, and steamboat therein, applied to the said W. H. Heuer for his permission, as Engineer officer in charge, to deposit said material or "spoil" at some other place than behind said bulkheads or dykes, and said Axman at said time showed to said W. H. Heuer that it was impossible to float said barges and scows and steam-
89 boat within said area because of the restricted place and shallow water therein, and that said Axman would be ruined if said Axman could not deposit said material or "spoil" at some other place.

That said W. H. Heuer refused to grant to said Axman permission to deposit material or "spoil" at any other place than behind said bulkheads or dykes within said points between said Pinole Point and said Lone Tree Point, and behind said bulkheads or dykes as built and constructed by said defendant as aforesaid, where the said W. H. Heuer well knew that said Axman could only take said scows at extremely high tide, and the said W. H. Heuer at said time, and at other times, declared to said Axman and to others that he intended to make said Axman deposit said material or "spoil" behind said bulkheads or dykes as built, constructed, and maintained by him between said point at Pinole Point and said point at Lone Tree Point, and that he intended to make said Axman lose money in doing so, and thereby ruin said Axman.

That after the said W. H. Heuer so determined to prevent said Axman from doing said work and so expressed himself, he did in every possible manner retard, delay, and hinder said Axman in the prosecution of the work contracted by said Axman to be done, and in pursuance of said purpose, the said W. H. Heuer did order said Axman to dredge said channel in places where but a small portion of the material necessarily removed would be paid for, and by refusing to take into account the unusual and abnormal force and violence
90 of the elements, which prevailed in San Pablo Bay, and caused delay, and by many other acts prevented said Axman from performing said contract and by finally unjustifiably annulling said contract.

And for a further answer and defence to said complaint, this defendant alleges that said alleged bond or contract by it alleged to have been executed was, and is, without consideration and void.

Wherefore, this defendant demands that it be hence dismissed with its costs.

JESSE W. LILIENTHAL,

Attorney for American Bonding Company of Baltimore.

UNITED STATES OF AMERICA, STATE OF CALIFORNIA,

City and County of San Francisco, ss:

Albert Raymond, being duly sworn, deposes and says:

That he is an officer, to wit, a resident vice president of the American Bonding Company of Baltimore; that he has read the above and foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, and the knowledge of said com-

pany, except as to matters therein stated to be on informitaon and belief, and as to those matters he believes it to be true.

ALBERT RAYMOND.

Subscribed and sworn to before me this 17th day of January, 1907.

[SEAL.]

HUGH T. SIME,

Notary Public in and for the

City and County of San Francisco, State of California.

91 [Endorsed:] Filed Jany. 17, 1907, Southard Hoffman, clerk.
By W. B. Maling, deputy clerk.

At a stated term, to wit, the March term, A. D. 1907, of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Friday, the 22d day of March, in the year of our Lord one thousand nine hundred and seven. Present: The honorable John J. De Haven, district judge.

UNITED STATES	}	No. 13914.
<i>vs.</i>		
RUDOLPH AXMAN ET AL.		

Order allowing motion to file amendment to complaint.

Plaintiff's motion for leave to file its amendment to its complaint was, after argument by the respective parties, allowed.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,	}
<i>vs.</i>	
RUDOLPH AXMAN AND AMERICAN BONDING Company of Baltimore (a corporation), defendants.	

92 Amendment to complaint.

Comes now the above-named plaintiff, and by leave of court first had and obtained, files this, as its amendment to its complaint:

I.

At the end of paragraph III of said complaint add the following: That said contract provided that the work was to be done under the following provisions of the river and harbor act of June 13th, 1902:

Improving San Pablo Bay, California, by constructing a channel between the Straits of Carquines and the Golden Gate, off Point Pinole, Point Wilson, and Lone Tree Point, three hundred feet in

width and thirty feet in depth, in accordance with the report submitted in House Document numbered eighty-nine, Fifty-sixth Congress, first session, one hundred thousand dollars: Provided, that a contract or contracts may be entered into by the Secretary of War for the completion of said project, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate two hundred and eighty-one thousand dollars exclusive of the amount herein appropriated.

II.

That said contract, together with the specifications attached thereto and made a part hereof, are in the words and figures following, to wit:

93 Advertisement. U. S. Engineer Office.

SAN FRANCISCO, CAL., *August 25, 1902.*

Sealed proposals for dredging in San Pablo Bay, California, will be received here until 12 noon Wednesday, October 1, 1902. Information on application.

W. H. HEUER,
Lieutenant Colonel, Engineers.

Specifications. General instructions for bidders.

1. The attention of bidders is especially invited to the acts of Congress approved February 26, 1885, and February 23, 1887, as printed in vol. 23, page 332, and vol. 24, page 414, United States Statutes at Large, which prohibit the importation of foreigners and aliens, under contract or agreement, to perform labor in the United States or Territories, or the District of Columbia.

2. Preference will be given to articles or materials of domestic production, conditions of quality and price being equal, including in the price of foreign articles the duty thereon.

3. No proposal will be considered unless accompanied by a guaranty which should be in manner and form as directed in these instructions.

4. All bids and guaranties must be made in duplicate, upon printed forms, to be obtained at this office.

5. The guaranty attached to each copy of the bid must be
94 signed by an authorized surety company, or by two responsible guarantors, to be certified as good and sufficient guarantors by a judge or clerk of a United States Court, United States district attorney, United States commissioner, or judge or clerk of a State court of record, with the seal of said court attached.

6. A firm as such will not be accepted as surety, nor a partner for a copartner or firm of which he is a member. Stockholders who are not officers of a corporation may be accepted as sureties for such cor-

poration. Sureties, if individuals, must be citizens of the United States.

7. When the principal, a guarantor, or a surety is an individual his signature to a guaranty or bond shall have affixed to it an adhesive seal. Corporate seals will be affixed by corporations, whether principals or sureties. All signatures to proposals, guaranties, contracts, and bonds should be written out in full, and each signature to guaranties, contracts, and bonds should be attested by at least one witness, and when practicable by a separate witness to each signature.

8. Each guarantor will justify in the sum of twenty thousand (20,000) dollars. The liability of the guarantors and bidder is determined by the act of March 3, 1883 (22 Statutes, 487, chap. 120), and is expressed in the guaranty attached to the bid.

9. A proposal by a person who affixes to his signature the word "president," "secretary," "agent," or other designation, without disclosing his principal, is the proposal of the individual.

That by a corporation should be signed with the name of the
95 corporation, followed by the signature of the president, secretary, or other person authorized to bind it in the matter, who should file evidence of his authority to do so. That by a firm should be signed with the firm name, either by a member thereof or by its agent, giving the names of all members of the firm. Anyone signing the proposal as the agent of another or others must file with it legal evidence of his authority to do so.

10. The place of residence of every bidder, and postoffice address, with county and State, must be given after his signature.

11. All prices must be written as well as expressed in figures.

12. One copy each of the advertisement, the instructions for bidders, and the specifications, all of which can be obtained at this office on application by mail or in person, must be securely attached to each copy of the proposal and be considered as comprising a part of it.

13. Proposals must be prepared without assistance from any person employed in or belonging to the military service of the United States or employed under this office.

14. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid, or to whom information in respect to proposals may have been given.

15. All blank spaces in the proposal and bond must be filled in, and no change shall be made in the phraseology of the proposal, or addition to the items mentioned therein. Any conditions,
96 limitations, or provisos attached to proposals will be liable to render them informal, and cause their rejection.

16. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

17. If a bidder wishes to withdraw his proposal he may do so before the time fixed for the opening, without prejudice to himself, by communicating his purpose in writing to the officer who holds

it, and, when reached, it shall be handed to him or his authorized agent, **unread**.

18. No bids received after the time set for opening of proposals will be considered.

19. The proposals and guaranties must be placed in a sealed envelope marked "Proposals for dredging in San Pablo Bay, California, to be opened October 1, 1902," and enclosed in another sealed envelope addressed to Lieut. Col. W. H. Heuer, Corps of Engineers, 41 Flood Building, San Francisco, Cal., but otherwise unmarked. It is suggested that the inner envelope be sealed with sealing wax.

20. It is understood and agreed that the quantities given are approximate only and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

21. The United States reserves the right to reject any and all bids, and to waive any informality in the bids received; also to disregard the bid of any failing bidder or contractor known as such to the Engineer Department, or any bid which is palpably unbalanced or obviously below what the work can be done for, or the bid of any bidder who shall fail to produce, when called upon to do so, evidence satisfactory to the Engineer officer in charge of the said bidder's ability to do the contemplated work within the required time, including his control of the necessary means and equipment. The failure of a bidder to make satisfactory progress or to complete on time similar work under previous contract with the United States, will be duly considered in canvassing bids, and may be a valid cause for the rejection of his proposal. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

22. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of fifty thousand dollars (\$50,000) within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provision, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

23. The sureties, if individuals, are to make and subscribe affidavits of jurisdiction of the back of the bond to the contract, and they must justify in amount which shall aggregate double the amount of the penal sum named in the bond.

24. Bidders are invited to be present at the opening of the bids.

General conditions.

25. A copy of the advertisement and of the specifications, instructions, and conditions will be attached to the contract and form a part of it.

26. The contractor, should within ten days from the award of the contract, furnish the office with the post-office address to which communications should be sent.

27. Transfers of contracts, or of interest in contracts, are prohibited by law.

28. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

29. The decision of the Engineer officer in charge as to quality and quantity shall be final.

30. Payments will be made monthly, subject to the provisions of paragraph 46 of these specifications. A percentage of ten (10) per centum will be reserved from each payment as provided for in paragraph 45 of these specifications.

99 31. The contractor will be required to commence work under the contract within sixty days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with faithfulness and energy, and to complete it within twenty-eight (28) months, after the date of commencement.

32. Unless extraordinary and unforeseeable conditions supervene, the time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital, and experience. If the work is not completed within the period stipulated in the contract, the Engineer officer in charge may, with the prior sanction of the Chief of Engineers, waive the time limit and permit the contractor to finish the work within a reasonable period, to be determined by the said Engineer officer in charge. Should the original time limit be thus waived, all expenses for inspection and superintendence and other actual loss and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said Engineer officer in charge and deducted from any payments due or to become due to the contractor. Provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, waive for a reasonable period the time limit originally set for completion and remit the charges for expenses of superintendence and inspection for so much

100 time as in the judgment of the Engineer officer in charge may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions or other unforeseeable cause of delay arising through no fault of the contractor, and which prevented him from commencing or completing the work or delivering the materials within the period re-

quired by the contract: Provided, further, that nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided in the form of contract adopted and in use by the Engineer Department of the Army.

33. The contractor will be required to hold the United States harmless against all claims for the use of any patented article, process, or appliance in connection with the contract herein contemplated.

34. All available information in the possession of the United States will be given upon application. The United States will not guarantee the correctness of its information, and will not be responsible for the safety of the employees or materials used by the contractor, nor for any damage done by or to them from any source or any cause. Bidders are expected to satisfy themselves as to the nature of the work to be done, and it will be assumed that proposals are based upon a thorough understanding of its character. Intending bidders are urged to visit the localities of the work and by personal inspection and inquiry fully to inform themselves as to the present and probable future conditions. No allowance or concession

will be made for any lack of information on the part of the contractor regarding the work. The price bid shall be full compensation for furnishing all necessary labor, materials, and appliances of every description, and for doing all the work herein specified to the satisfaction of the engineer officer in charge, and shall include all risks and delays of whatever nature attending the execution of the work.

General description.

35. The shoal to be dredged is in San Pablo Bay, California, is about 5 miles in length, and has a least depth of 19 feet at low water. It extends from Pinole Point to Lone Tree Point and is distant $1\frac{1}{2}$ to $1\frac{1}{2}$ statute miles NW. of the points referred to. The average depth of the excavation is about 9 feet.

36. The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet; to deposit the spoil as near the south shore as practicable, within lines drawn between Pinole Point and Lone Tree Point, as such places as may be designated by the engineer officer in charge, and to impound the material behind bulkheads or dykes of suitable construction, subject to approval by the engineer officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract.

Dredging.

37. The depth of cutting will vary from 0 feet to 11 feet. The mean low-water depth to be obtained under this contract is 30 feet. The first cut will be made about 100 feet wide throughout the length

of the shoal. All material above a depth of 30 feet
102 must be removed. Payment will be made, however, at one-half
of full contract rates for all material shown in the final survey
to have been removed from between the depths of 30 and 31 feet.
Side slopes of 3 horizontal to 1 vertical will be permitted along the
lines of the proposed completed channel.

38. Material dredged outside the designated lines of excavation
below the depths provided in paragraph 37, or deposited otherwise
than as herein specified, directed, and agreed upon, will not be paid
for. The total amount to be dredged is estimated at 2,721,000 cubic
yards, more or less.

Deposit of material.

39. All dredged material is to be deposited within the limits of
the area described in paragraph 36. The method of deposit will be
subject to approval by the engineer officer in charge.

40. The part of the area available for the deposit of material from
scows has an average width of about $\frac{3}{4}$ of a mile. Its distance from
the site of dredging varies from 1 to 2 miles. The location of the
place of deposit, the depths of water therein, and the location of the
dredging are shown on maps on file in this office.

41. All material dredged and not disposed of as directed by the
engineer officer in charge, or any unauthorized dumpage, must be
properly disposed of when required by the engineer officer in charge.

Character of material.

42. No guarantee is given as to the character of the material
103 to be dredged. It is believed to be sand and slickens. No claim
shall be made by the contractor on account of material moved
by the action of the currents.

Amount of dredging.

43. The work is to be done under the following provisions of the
river and harbor act of June 13, 1902: Improving San Pablo Bay,
California, by constructing a channel between the Straits of Car-
guines and the Golden Gate, off Point Pinole, Point Wilson, and Lone
Tree Point, three hundred feet in width and thirty feet in depth, in
accordance with the report submitted in House document numbered
eighty-nine, Fifty-sixth Congress, first session, one hundred thousand
dollars: Provided, that a contract or contracts may be entered into
by the Secretary of War for the completion of said project, to be
paid for as appropriations may from time to time be made by law,
not to exceed in the aggregate two hundred and eighty-one thousand
dollars, exclusive of the amount herein appropriated.

44. It will be observed that one hundred thousand dollars, less
engineering expenses, is now available for dredging the channel. It
is expected that Congress will, in accordance with the provisions of

the act, make appropriations at such time as to permit payments for the work done under these specification to be made without interruption or delay; but the contractor must assume all risks as to time of payments. In case available funds for payments of contractor become exhausted before the completion of the contract, the engineer officer in charge will give written notice to the contractor

104 that the work may be suspended; but if the contractor so elects he may continue work under the conditions of the specification so long as funds for proper superintendence and inspection are available, and no longer with the understanding, however, that no payments will be made for such work until additional funds have been provided in sufficient amount, at which time the engineer officer in charge will give thirty days' written notice to the contractor that work must be resumed. It is distinctly understood and agreed that the United States is in no case to be made liable for damages under or in connection with this contract on account of delay in payments on same due to any lack of available funds.

45. With the funds now available, and such as may hereafter be appropriated, payments, less ten per centum, will be made monthly for all material removed from the cut above the grade plane, provided a satisfactory rate of progress as described in paragraph 46 of these specifications has been made.

The ten per centum deductions will be made monthly until 1,400,000 cubic yards of material, measured in place, have been excavated, accepted and paid for; thereafter, monthly payments will be made in full without further deductions; provided satisfactory progress has been maintained. The retained percentages will not be paid until the satisfactory completion of the contract.

Progress of the work.

46. The work must progress at the rate of at least 100,000 cubic yards per month, and to entitle the contractor to the monthly
105 payments provided for in paragraph 30 of these specifications, an average of not less than 100,000 cubic yards per month must have been dredged and deposited; the calculation of averages to be made from the day on which the contract requires the work to be commenced.

Plant.

47. The contractor will be required to provide and maintain such a plant as the Engineer officer in charge shall deem necessary for the vigorous prosecution of the work. The plant shall be at all times subject to the *insection* and approval of the Engineer officer in charge. If deemed insufficient or inadequate, the contractor will be required to increase or change the plant to the extent found necessary. All plant and appliances must be kept in good condition in every respect. The contractor shall give immediate notice in writing to the engi-

neer officer in charge of the arrival upon or withdrawal from the work of any portion of his plant; provided, however, that the number of dredges may not be diminished at any time without first obtaining the consent of the Engineer officer in charge.

48. If at any time after the date set for beginning work it shall be found that the required minimum rate of progress is not being maintained, the Engineer officer in charge shall have the power, after due notice in writing to the contractor, to employ such additional plant or purchase such materials as may be necessary to ensure the completion of the work within the time specified, charging the cost thereof against such sums as may be due or become due to the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract as provided for in the form of contract to be entered into.

Time of work.

49. Work must be pushed continuously, except on Sundays and legal holidays. Night work will be permitted, when proper provision must be made, in all cases by the contractor at his expense, for the comfort of the inspectors and other United States employees who may be on the work.

Measurements.

50. All material will be paid for by the cubic yard, measured in place. Price bid shall include all expenses of transportation, construction and maintenance of bulkheads, and disposal of the material as above provided.

Supervision.

51. The work will be conducted in strict accordance with the instructions of the Engineer officer in charge. All operations connected with the work will be under the immediate supervision of assistant engineers, inspectors, or other agents of the Engineer officer in charge.

52. In case of any doubt as to the intent or meaning of these specifications, the decision of the Engineer officer in charge shall be final.

53. No method of dredging which does not leave a clear channel of the specified depth behind the dredge will be permitted, and all material must be excavated and deposited under the supervision of the Engineer officer in charge or his agents. The contractor will be required to furnish, without expense to the

United States, all stakes, piles, gauges, buoys, ranges or other material, required for laying out and conducting the work of dredging and depositing and to furnish men and boats to place and maintain them as directed by the Engineer officer in charge; he shall also furnish, drive and maintain on one side of the proposed channel one pile at each 500 feet of its length. No work will be permitted unless

the necessary gauges, ranges, buoys, etc., are in proper position and visible from the plant employed for that work. When required, the contractor is to furnish without expense to the United States, boats and men to enable the inspectors to perform properly their duties.

Transportation of U. S. employees, etc.

54. When required, suitable transportation from San Francisco, and other points on shore to be designated by the Engineer officer in charge, to and from all work, dredges, and dumping grounds, and approved board and lodgings for the United States employees engaged on the work, will be provided by the contractor, the board and lodgings to be paid for by the United States at a rate not to exceed \$20 per month. The cost of transportation is to be included in the price bid for doing the work.

Objectionable employees.

55. Any person employed by the contractor on the work who in the opinion of the Engineer officer in charge is disorderly or
108 incompetent or guilty of improper conduct at work, or who disobeys or evades orders and instructions, shall, upon the request of the Engineer officer in charge, be immediately discharged and not reemployed on the work. Such discharge shall not form the basis of any claim for compensation or damage against the United States or any of its officers or employees.

Location of the work.

56. The location of the work to be done will be fixed in advance by the Engineer officer in charge or his agents. Plainly marked tide gauges will be established in view of each part of the work, so that the proper depths may be at all times determined and ascertained. The level of mean low water will be established before the commencement of the work, and shall not be changed during its progress. Lines will be plainly marked by stakes, range marks, pile signals, buoys, or other suitable method; and in case these marks are removed by any cause, the contractor must replace them, as provided in paragraph 53.

Acceptance of the work.

57. Work will be accepted when completed to the satisfaction of the engineer officer in charge. Should shoaling, however, afterwards occur in the accepted channel before the close of the contract, the contractor may be required to redredge such shoals to their proper depth, provided funds are available therefor, at the price bid for the excavation and deposit of material. The monthly payments shall not be construed as an acceptance of any part of the work.

Modification of specifications.

58. The right is reserved to make such minor changes in these specifications as may be necessary or expedient to carry out the intent of the contract, and no increase in price shall be paid the contractor on account of such changes, except as provided in the form of contract to be entered into.

Proposals.

59. Bidders shall state on the form hereto appended a price per cubic yard, measured in place, for material excavated and deposited in accordance with these specifications, the price bid to include a bulkhead of timber, of approved design, to securely impound the material dredged, and to be full compensation for doing the work.

60. Bidders must satisfy the Engineer officer in charge of their ability to do the work required, and that suitable and sufficient plant is under their control to carry out the contract in accordance with these specifications.

Removal of plant, obstructions, etc.

61. When required by the Engineer officer in charge, and upon the completion of the work, the contractor shall remove his plant and all appliances, including buoys, piles, gauge piles, ranges, etc., used in the work, and shall leave the channel in good order, clear, secure, and fit for navigation.

62. When required by the Engineer officer in charge, the contractor shall remove all his machinery and appliances from the dumping grounds or places of deposit for excavated material.

110 63. Should the contractor, during the progress of the work, disturb or break up any materials, or sink, lose, dump, throw overboard, or misplace any materials, plant, machinery, etc., which is the opinion of the Engineer officer in charge may be dangerous to or obstruct navigation, he shall forthwith recover and remove the same with the utmost possible dispatch. The contractor shall give immediate notice, with description and location of such obstructions, to the Engineer officer in charge, or the assistant engineer, and when required shall mark or buoy such obstructions until the same are removed.

Supervision by contractor.

64. The contractor must personally supervise the work during its progress, or have it constantly under the supervision of a careful, skilled, and responsible representative, so as to insure prompt and proper compliance with the terms of the contract and specifications and all instructions given concerning the work by the Engineer officer in charge.

65. The contractor shall keep suitable lights each night, between sunset and sunrise, upon all his vessels and appliances anchored or stationed on the work during the progress of the contract, and shall properly repair, at his own expense, all damages resulting from neglect to keep such lights.

San Francisco, Cal., August 25, 1902.

111 Proposal for dredging in San Pablo Bay, California.

SAN FRANCISCO, CAL., 30th September, 1902.

To Lieutenant Colonel W. H. HEUER,

Corps of Engineers, 41 Flood Bldg., San Francisco, Cal.

SIR: In accordance with our advertisement of August 25, 1902, inviting proposals for dredging in San Pablo Bay, California, and subject to all the conditions and requirements thereof, and of your specifications dated August 25, 1902, copies of both of which are hereto attached, and, so far as they relate to this proposal, are made a part of it, we (or) I propose to furnish all plant, labor and materials and do the work therein specified for eleven and 44/100 (11.44) cents per cubic yard.

We (or) I make this proposal with a full knowledge of the kind, quantity, and quality of the articles required, and, if it is accepted, will, after receiving written notice of such acceptance, enter into contract within the time designated in the specification, with good and sufficient sureties for faithful performance thereof.

(Signature)

RUDOLF AXMAN,

(Address)

San Francisco, Cal.

(Signature)

(Address)

(Signed in duplicate.)

Guaranty to accompany proposal.

(When guarantors are individuals.)

We, Frederick L. Turpin, of the city and county of San Francisco, and State of California, and Irwin J. Truman, of the city and county of San Francisco, and State of California, hereby undertake that if the bid of Rudolph Axman, herewith accompanying, dated 30 September, 1902, for dredging in San Pablo Bay, California, be accepted as to any or all of the items of supplies, materials, and services proposed to be furnished thereby, or as to any portion of the same, within sixty days from the date of the opening of proposals therefor, the said bidder, Rudolph Axman, will, within ten (10) days after notice of such acceptance, enter into a contract with the proper officer of the United States to furnish such articles of supplies and materials and such services of those proposed to be furnished by said bid as shall be accepted, at the prices offered by said bid and in accordance with the terms and conditions of the advertisement inviting said proposals, and will give bond, with good

and sufficient surety or sureties, as may be required for the faithful and proper fulfillment of such contract. And we bind ourselves, our heirs, executors and administrators, jointly and severally to pay to the United States, in case the said bidder shall fail to enter into such contract or give such bond within ten (10) days after said notice of acceptance, the difference in money between the amount of the bid of said bidder on the articles or services so accepted, and the amount for which the proper officer of the United States may contract with another party to furnish said articles and services, if the latter amount be in excess of the former.

113 Given under our hands and seals this 30th day of September, nineteen hundred and two.

In presence of

J. S. MANLEY as to Frederick L. Turpin. [L. S.]

J. B. SHERRARD as to Irwin J. Truman. [L. S.]

x Affix adhesive seal.

STATE OF CALIFORNIA, *City and County of San Francisco, ss.*

I, Frederick L. Turpin, one of the guarantors named in the foregoing guaranty, do swear that I am pecuniarily worth the sum of twenty thousand dollars over and above all my debts and liabilities.

FREDERICK L. TURPIN.

Subscribed and sworn to before me this 30th day of September, 1902, at San Francisco.

J. S. MANLEY,¹

*United States Commissioner for the
Northern District of California, at San Francisco.*

STATE OF CALIFORNIA, *City and County of San Francisco, ss.*

I, Irwin J. Truman, one of the guarantors named in the foregoing guaranty, do swear that I am pecuniarily worth the sum of twenty thousand dollars over and above all my debts and liabilities.

IRWIN J. TRUMAN.

Subscribed and sworn to before me this 30th day of September, 1902, at San Francisco.

J. S. MANLEY,¹

*United States Commissioner for the
Northern District of California, at San Francisco.*

114 I,² J. S. Manley, do hereby certify that Frederick L. Turpin and Irwin J. Truman, the guarantors above named, are personally known to me, and that, to the best of my knowledge and belief, each³ is pecuniarily worth, over and above all his debts and liabilities, the sum stated in the accompanying affidavit subscribed by him.

J. S. MANLEY,

*United States Commissioner for the
Northern District of California, at San Francisco.*

Form 19a.

1. This agreement, entered into this 21st day of November, nineteen hundred and two, between W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, of the first part, and Rudolph Axman, of the city and county of San Francisco, State of California, of the second part, witnesseth, that, in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said W. H. Heuer, for and in behalf of the United States of America, and the said Rudolph Axman, for himself, his heirs, executors, and administrators, do covenant and agree, to and with each other, as follows: That he, the said Rudolph Axman, will do such dredging in San Pablo Bay, California, as may be required by the said W. H. Heuer, in accordance with the specifications hereunto annexed, and that he, the said W. H. Heuer, or his successor, will pay to the said Rudolph Axman the sum of eleven and forty-four one-hundredths cents per cubic yard for all such dredging as shall be done in strict accordance with the said
115 specifications hereunto annexed, and is ordered and accepted by the said W. H. Heuer, or his agent.

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

3. The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraphs 31 and 46 of the attached specifications.

4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successors legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall
116 be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part

of completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first party may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first party shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise in accordance with law.

5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses
 117 . and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said party of the first part and deducted from any payments due or to become due the party of the second part: Provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force, or violence of the elements, or by epidemics, local or State quarantine restriction, or other unforeseen cause of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work or delivering the materials within the period required by the contract, but such waiver of time and remission of charges shall in no other manner effect the rights or obligations of the parties under this contract.

6. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project and this change of modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, and the agreement setting forth
 118 fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no obligation shall be made unless such supplemental or modified agreement

was signed and approved before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for, or on account of, any extra work for material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part, or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

8. The party of the second party shall be responsible for and pay all the liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all the material and work herein provided for, no prior inspection, payment, or act is to be constructed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and
119 save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and the work to be done under this contract.

11. Payments shall be made to the said party of the second part as prescribed in paragraph 30 of the specifications hereto attached and forming part of this agreement.

12. Either this contract or any interest therein shall be transferred to any other part or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferrer, or the transferee, but all rights of action for any breach of this contract by said Rudolph Axman are reserved to the United States.

13. No Member of or Delegate to Congress, nor any person belonging to, or employed in the military service of the United States is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom. #

14. This contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof, the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

JOHN E. RICHARDS as to W. H. Heuer,
Lieut. Colonel, Corps of Engineers.

G. KNIGHT WHITE as to Rudolph Axman.

120

(Executed in quintuplicate.)

Approved: Dec. 27, 1902.

G. S. GILLISPIE,
Brig. Gen., Chief of Engineers, U. S. Army.

3-1778.

Subscribed and sworn to before me this ____ day of ____, 190—.
 _____,
 _____.

I do solemnly swear that the copy of contract hereto annexed is an exact copy of a contract made by me personally with ____; that I made the same fairly without any benefits or advantage to myself, or allowing any such benefit or advantage corruptly to the said ____ or any other person; and that the papers accompanying include all those relating to the said contract as required by the statute in such case made and provided.

_____,
 _____, *Corps of Engineers.*

I certify that the award of the foregoing contract was made to the lowest responsible bidder for the best and most suitable articles and service, on proposals received in response to advertisement hereto attached, which was published for thirty-seven days by newspaper and that further advertisement was impracticable.

W. H. HEUER,
Lieut. Colonel, Corps of Engineers, Contracting Officer.

ROBT. T. DEVLIN,
Attorney for Plaintiff.

121 [Endorsed]: Filed March 22d, 1907. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

*In the Circuit Court of the United States, Ninth Judicial Circuit,
 Northern District of California.*

THE UNITED STATES OF AMERICA, PLAINTIFF,	} No. 13,914.
<i>vs.</i>	
RUDOLPH AXMAN AND AMERICAN BONDING COMPANY OF Baltimore (a corporation), defendants.	

Verdict [filed March 26, 1907].

We, the jury, find in favor of the plaintiff and assess the damages against the defendants in the sum of thirty-nine thousand nine hundred and two 59/100 dollars.

J. F. SMITH, *Foreman.*

[Endorsed]: Filed Mch. 26th, 1907. Southard Hoffman, clerk.
 By J. A. Schaertzer, deputy clerk.

122 *In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.*

<p>THE UNITED STATES OF AMERICA, PLAINTIFF, <i>vs.</i> RUDOLPH AXMAN AND AMERICAN BONDING COMPANY OF Baltimore (a corporation), defendants.</p>	}	No. 13,914.
--	---	-------------

Judgment [filed March 26, 1907].

This cause having come on regularly for trial upon the 21st day of March, 1907, being a day in the March, 1907, term of said court; Robert T. Devlin, Esq., United States Attorney, and George Clark, Esq., Assistant United States Attorney, having appeared on behalf of the plaintiff, and Messrs. Aitken & Aitken and Charles A. Shurtleff, Esq., having appeared as attorneys for defendant Rudolph Axman, and Jesse W. Lilienthal, Esq., having appeared as attorney for defendant American Bonding Company of Baltimore, a corporation, and a jury of twelve men having been impaneled and sworn to try the issues joined herein, and the trial having been proceeded with on the 22d, 23d, 25th, and 26th days of March, 1907, and evidence oral and documentary, on behalf of the respective parties having been introduced, and the evidence having been closed, and

123 the cause after arguments of the attorneys and the instructions of the court, been submitted to the jury, and the jury after due deliberation having returned the following verdict which was recorded, viz.: "We, the jury, find in favor of the plaintiff and assess the damages against the defendants in the sum of thirty-nine thousand nine hundred and two 59/100 dollars, (signed) J. F. Smith, Foreman"; and the court having ordered that judgment be entered herein in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that the United States of America, plaintiff, do have and recover of and from Rudolph Axman and American Bonding Company of Baltimore, a corporation, defendants, the sum of thirty-nine thousand nine hundred and two and 59/100 (\$39,902.59) dollars, together with its costs in this behalf expended taxed at \$——.

Judgment entered March 26, 1907.

SOUTHARD HOFFMAN,
Clerk.

A true copy.

[SEAL]

Attest: SOUTHARD HOFFMAN,

By J. A. SCHAERTZER,
Deputy Clerk.

[Endorsed]: Filed March 26, 1907. Southard Hoffman, clerk.
 By J. A. Schaertzer, deputy clerk.

124 *In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.*

UNITED STATES OF AMERICA

vs.

No. 13,914.

RUDOLPH AXMAN ET AL.

Clerk's certificate to judgment-roll.

I, Southard Hoffman, clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court, this 26th day of March, 1907.

[SEAL]

SOUTHARD HOFFMAN,
Clerk.

By W. B. MALING,
Deputy Clerk.

[Endorsed]: Filed March 26, 1907. Southard Hoffman, clerk.
By W. B. Maling, deputy clerk.

At a stated term, to wit, the November term, A. D. 1909, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on
125 Thursday, the 24th day of February, in the year of our Lord one thousand nine hundred and ten. Present: The honorable William C. Van Fleet, district judge.

THE UNITED STATES	}	No. 13,914.
<i>vs.</i>		
RUDOLPH AXMAN ET AL.		

Order spreading mandates of United States Circuit Court of Appeals for the Ninth Circuit upon minutes.

Upon motion of George Clark, Assistant United States Attorney, it is ordered that the mandates of the United States Circuit Court of Appeals for the Ninth Circuit, be filed and spread upon the minutes of this court, to wit:

Mandate [of U. S. Circuit Court of Appeals].

UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America, to the honorable the judges of the Circuit Court of the United States for the Northern District of California, Greeting:

[Seal U. S. Cir. Ct. of Appeals.]

Whereas, lately, in the Circuit Court of the United States for the Northern District of California, before you, or some of you, in a

cause between The United States of America, plaintiff, and Rudolph Axman and American Bonding Company of Baltimore (a corporation), defendants, No. 13,914, a judgment was duly filed and entered on the 26th day of March, A. D. 1907, in favor of the said plaintiff and against the said defendants; which said judgment is of record in the said cause in the office of the clerk of the said Circuit Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of a writ of error prosecuted by the American Bonding Company of Baltimore, a corporation, as plaintiff in error agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

And whereas, on the third day of June in the year of our Lord one thousand nine hundred and eight, the said cause came on to be heard before the said Circuit Court of Appeals, upon the said transcript of the record, and was duly argued and submitted:

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, and the cause is remanded to the said Circuit Court for a new trial.

(February 1, 1909).

You, therefore, are hereby commanded that such new trial and further proceedings be had in the said cause in accordance with the opinion and judgment of this court and as according to right and justice and the laws of the United States ought to be had, the said judgment of the said Circuit Court notwithstanding.

Witness, the honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of February, in the year of our Lord one thousand nine hundred and ten.

F. D. MONCKTON,

*Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.*

[Endorsed:] Filed and spread on the minutes, Feb. 24, 1910. Southard Hoffman, clerk Circuit Court. By W. B. Maling, deputy clerk.

Mandate [of U. S. Circuit Court of Appeals].

UNITED STATES OF AMERICA, *vs.*

The President of the United States of America to the honorable the judges of the Circuit Court of the United States for the Northern District of California, greeting:

[Seal of Cir. Ct. of Appeals.]

Whereas lately in the Circuit Court of the United States for the Northern District of California, before you, or some of you, in a cause between The United States of America against *Rudolf Axman* and American Bonding Company, a judgment was entered in favor

of the said the United States of America and against *Rudolf Axman* which said judgment is of record in the said cause in the office of the clerk of the said Circuit Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as by the inspection of the stipulation of counsel, filed October 6, 1908, which was brought into the United States Circuit Court of Appeals for the

Ninth Circuit by virtue of a writ of error prosecuted by the
128 said *Rudolf Axman* as plaintiff in error agreeably to the act of Congress in such cases made and provided, fully and at large appears:

And whereas, on the sixth day of October, in the year of our Lord one thousand nine hundred and eight, the said cause came on to be heard before the said Circuit Court of Appeals, upon the transcript of the record, filed in said Circuit Court of Appeals in the cause entitled *American Bonding Company of Baltimore*, a corporation, plaintiff in error, vs. *The United States of America*, defendant in error, No. 1570, pursuant to the said stipulation, and was duly submitted:

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, and the cause is remanded to the said Circuit Court for a new trial.

(February 2, 1909.)

You, therefore, are hereby commanded that such new trial and further proceedings be had in the said cause in accordance with the opinion and judgment of this court and as according to right and justice and the laws of the United States ought to be had, the said judgment of the said Circuit Court notwithstanding.

Witness, the honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of February, in the year of our Lord one thousand nine hundred and ten.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals

for the Ninth Circuit.

129 [Endorsed:] Filed and spread on the minutes Feb. 24, 1910. Southard Hoffman, clerk Circuit Court. By W. B. Maling, deputy clerk.

United States Circuit Court for the Northern District of California.

THE UNITED STATES OF AMERICA	} No. 13914.
vs.	
RUDOLF AXMAN ET AL.	

Verdict [Filed December 13, 1910].

We, the jury, find in favor of the defendants.

J. M. LONG,

Foreman.

[Endorsed:] Filed December 13, 1910. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

UNITED STATES VS. RUDOLPH AXMAN.

*In the Circuit Court of the United States, Ninth Judicial Circuit,
Northern District of California.*

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.

RUDOLF AXMAN AND AMERICAN BONDING COMPANY
of Baltimore (a corporation), defendants. } No. 13914.

Judgment [filed December 13, 1910].

130 This cause having come on regularly for trial upon the 13th day of December, 1910, being a day in the November, 1910, term of said court, before the court and a jury of twelve men duly impaneled and sworn to try the issues joined herein, George Clark, Esq., assistant United States attorney, appearing on behalf of the plaintiff, and Messrs. Aitken & Aitken and Jesse W. Lilienthal, Esq., appearing on behalf of the defendants, and the trial having been proceeded with upon the 13th day of December, 1910, and evidence, upon behalf of the respective parties having been introduced and closed, and the cause, after the instructions of the court having been submitted to the jury, and the jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We, the jury, find in favor of the defendants. J. M. Long, foreman," and the court having ordered that judgment be entered in accordance with said verdict:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that plaintiff take nothing by this action and that defendants go hereby without day.

Judgment entered December 13, 1910.

SOUTHARD HOFFMAN,
Clerk.

By J. A. SCHAERTZER,
Deputy Clerk.

A true copy.
[SEAL.] Attest:

SOUTHARD HOFFMAN,
Clerk.

By J. A. SCHAERTZER,
Deputy Clerk.

131 [Endorsed]: Filed December 13, 1910. Southard Hoffman, clerk. By J. A. Schaertzer, deputy clerk.

*In the Circuit Court of the United States, Ninth Judicial Circuit,
in and for the Northern District of California.*

UNITED STATES OF AMERICA

vs.

No. 13,914.

RUDOLF AXMAN ET AL.

Certificate to judgment roll.

I, Southard Hoffman, clerk of the Circuit Court of the United States for the Ninth Judicial Circuit, Northern District of Cali-

fornia, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court this 13th day of December, 1910.

[SEAL.]

SOUTHAIRD HOFFMAN, *Clerk.*
By J. A. SCHAEERTZER,
Deputy Clerk.

[Endorsed]: Judgment roll. Filed December 13th, 1910. Southard Hoffman, clerk. By J. A. Schaertzer, deputy clerk.

132 *In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

UNITED STATES OF AMERICA, PLAINTIFF,
vs.

RUDOLF AXMAN AND AMERICAN BONDING COMPANY OF BALTIMORE
(a corporation), defendants.

Bill of exceptions.

Be it remembered that this cause came on regularly for trial on the 13th day of December, 1910, before the court, Hon. W. C. Van Fleet, presiding, and a jury. Robt. T. Devlin, Esq., United States attorney, and George Clark, Esq., assistant United States attorney, appeared as attorneys for the plaintiff, United States of America; Jesse W. Lilienthal, Esq., appeared as attorney for the defendant, American Bonding Company of Baltimore; and Messrs. Aitken & Aitken and Charles A. Schurtleff, Esq., appeared as attorneys for the defendant, Rudolf Axman. Leave having been granted to the plaintiff to amend its original complaint, it was stipulated that to the said amended complaint the defendants and each of them severally interposed the same demurrers and answers that they did to the original complaint, which demurrers and each of them were overruled by the court, the defendants and each of them then and there reserving an exception to such action of the court.

133 The cause was tried upon the complaint of the plaintiff as amended and the answers of the defendants made to the original complaint deemed taken as the answers to the said amended complaint.

The following proceedings were had and testimony given:

A jury was regularly impaneled and sworn to try the case.

[Testimony of William H. Heuer, for plaintiff.]

Thereupon William H. Heuer, called and sworn on behalf of plaintiff, testified as follows:

Direct examination.

I was, until some time ago, United States engineer for what they call the Pacific division.

Mr. LILIENTHAL. Your Honor has already passed upon the sufficiency of the complaint, but for the sake of the record I move that all testimony on the part of the plaintiff be excluded on the ground that the complaint does not state a cause of action against the defendant, the American Bonding Company.

Mr. AITKEN. We make the same motion on behalf of the defendant, Rudolf Axman.

WITNESS (continuing). I was not acting as division engineer in 1902. In that year I was acting in the capacity of district engineer.

Q. Did you at that time in behalf of the Government of the United States have in charge the letting of certain work, generally speaking, the dredging of a channel in San Pablo Bay off Lone Tree and Pinole Points?

134 Mr. CLARK. Q. I will hand you a written instrument, and will ask you if you recognize the document [handing witness the document].

A. I do.

Q. Are you the W. H. Heuer whose name is signed to this instrument?

WITNESS (continuing). I am the W. H. Heuer who executed that instrument and who signed it on the part of the United States.

Q. You recognize the signature below your own?

A. I do.

Mr. LILIENTHAL. May it be understood that the objection in each instance runs in favor of both defendants? I think it will save the time of the court.

The COURT. Yes.

At this point the witness, W. H. Heuer, was temporarily withdrawn.

[Testimony of G. Knight White, for plaintiff.]

G. Knight White, called and sworn on behalf of plaintiff, testified as follows:

Direct examination.

I am chief clerk in the United States engineer's office, and was such chief clerk in November, 1902. I had occasion to witness the execution of a certain contract between the United States, by W. H. Heuer acting for the United States, and Rudolph Axman. [Handing witness instrument.] The signature at the foot of that instrument

is mine. One of those two signatures to the right is that of 135 W. H. Heuer, and the other is that of Mr. Rudolph Axman.

I signed the instrument as a witness. That is Mr. Richards' signature. This copy of the contract is one of the originals thereof, and was forwarded to Washington. The contract was made in quintuplicate, and at that time they all five went to Washington.

Memorandum relative to further direct examination of William H. Heuer.

At this point *with* witness was withdrawn, and William H. Heuer called for further direct examination.

The contract was then and there offered and received in evidence and considered read, and marked Plaintiff's Exhibit "A." and is in the words and figures following, to wit:

Plaintiff's Exhibit "A."

Advertisement.

U. S. Engineer Office.

SAN FRANCISCO, CAL., August 25, 1902.

Sealed proposals for dredging in San Pablo Bay, California, will be received here until 12, noon, Wednesday, October 1, 1902, information on application.

W. H. HEUER.

Lieutenant-Colonel, Engineers.

Specifications.

General instructions for bidders.

1. The attention of bidders is especially invited to the acts of Congress approved February 26, 1885, and February 23, 1887, as printed in vol. 23, page 332, and vol. 24, page 414, United States Statutes at Large, which prohibit the importation of foreigners and aliens, under contract or agreement, to perform labor in the United States or Territories, or the District of Columbia.
2. Preference will be given to articles or materials of domestic production, conditions of quality and price being equal, including in the price of foreign articles the duty thereon.
3. No proposal will be considered unless accompanied by a guaranty which should be in manner and form as directed in these instructions.
4. All bids and guaranties must be made in duplicate, upon printed forms to be obtained at this office.
5. The guaranty attached to each copy of the bid must be signed by an authorized surety company, or by two responsible guarantors, to be certified as good and sufficient guarantors, by a judge or clerk of a United States court, United States District Attorney, United States commissioner, or judge or clerk of a State court of record, with the seal of said court attached.
6. A firm as such will not be accepted as surety, nor a partner for a copartner firm of which he is a member. Stockholders who are not officers of a corporation may be accepted as sureties for such corporation. Sureties, if individuals, must be citizens of the United States.
7. When the principal, a guarantor, or a surety, is an individual, his signature to a guaranty or bond shall have affixed to it an adhesive seal. Corporate seals will be affixed by corporation, whether principals or sureties. All signatures to proposals, guaranties, contracts, and bonds should be written out in full, and

each signature to guaranties, contracts, and bonds, should be attested by at least one witness, and, when practicable, by a separate witness to each signature.

8. Each guarantor will justify in the sum of twenty thousand (20,000) dollars. The liability of the guarantors and bidder is determined by the act of March 3, 1883, 22 Statutes, 487, chap. 120, and is expressed in guaranty attached to the bid.

9. A proposal by a person who affixes to his signature the word "president," "secretary," "agent," or other designation, without disclosing his principal, is the proposal of the individual. That by a corporation should be signed with the name of the corporation, followed by the signature of the president, secretary, or other person authorized to bind it in the matter, who should file evidence of his authority to do so. That by a firm should be signed with the firm name, either by a member thereof or by its agent, giving the names of all members of the firm. Anyone signing the proposals as the agent of another or others must file with it legal evidence of his authority to do so.

10. The place of residence of every bidder, and postoffice address, with county and state, must be given after his signature.

11. All prices must be written as well as expressed in figures.

12. One copy of each of the advertisement, the instructions for bidders, and the specifications, all of which can be obtained
138 at this office on application by mail or in person, must be securely attached to each copy of the proposal and be considered as comprising a part of it.

13. Proposals must be prepared without assistance from any person employed in or belonging to the military service of the United States or employed under this office.

14. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid, or to whom information in respect to proposals may have been given.

15. All blank spaces in the proposals and bond must be filled in, and no change shall be made in the phraseology of the proposal, or addition to the items mentioned therein. Any conditions, limitations, or provisos attached to proposals will be liable to render them informal, and cause their rejection.

16. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

17. If a bidder wishes to withdraw his proposal he may do so before the time fixed for the opening, without prejudice to himself, by communicating his purpose in writing to the officer who holds it, and when reached, it shall be handed to him or his authorized agent, unread.

18. No bids received after the time set for opening of proposals will be considered.

19. The proposals and guaranties must be placed in a sealed envelope marked "Proposals for dredging in San Pablo Bay, California, to be opened October 1, 1902," and enclosed in another

139 sealed envelope addressed to Lieut.-Col. W. H. Heuer, Corps of Engineers, 41 Flood Building, San Francisco, Cal., but otherwise unmarked. It is suggested that the inner envelope be sealed with sealing wax.

20. It is understood and agreed that the quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

21. The United States reserves the right to reject any and all bids, and to waive any informality in the bids received; also to disregard the bid of any failing bidder or contractor known as such to the Engineer Department, or any bid which is palpably unbalanced or obviously below what the work can be done for, or the bid of any bidder who shall fail to produce, when called upon to do so, evidence satisfactory to the Engineer officer in charge, of the said bidder's ability to do the contemplated work within the required time, including his control of the necessary means and equipment. The failure of a bidder to make satisfactory progress or to complete on time similar work under previous contracts with the United States will be duly considered in canvassing bids and may be a valid cause for the
140 rejection of his proposal. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

22. The bidder to whom award is made will be required to enter into a written contract with the United States, with a good and approved security, in an amount of fifty thousand dollars, (\$50,000), within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be in its general provisions in the form adopted and in general use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

23. The sureties, if individuals, are to make and subscribe affidavits of justification on the back of the bond to the contract, and they must justify in amounts which shall aggregate double the amount of the penal sum named in the bond.

24. Bidders are invited to be present at the opening of the bids.

General conditions.

25. A copy of the advertisement and of the specifications, instructions, and conditions will be attached to the contract and form a part of it.

26. The contractor, should within ten days from the award
141 of the contract, furnish the office with the postoffice address
to which communications should be sent.

27. Transfers of contracts, or of interest in contracts, are prohibited by law.

28. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

29. The decision of the Engineer officer in charge as to quality and quantity shall be final.

30. Payments will be made monthly, subject to the provisions of paragraph 46 of these specifications. A percentage of ten (10) per centum will be reserved from each payment as provided for in paragraph 45 of these specifications.

31. The contractor will be required to commence work under the contract within sixty days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with the faithfulness and energy, and to complete it within twenty-eight (28) months, after the date of commencement.

32. Unless ordinary and unforeseeable conditions supervene, the time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital, and experience. If the work is not completed within the period stipulated in the contract, the Engineer officer in charge may, with the proper sanction
of the Chief of Engineers, waive the time limit and permit

142 the contractor to finish the work within a reasonable period, to be determined by the said Engineer officer in charge. Should the original time limit be thus waived, all expenses for inspection and superintendence and other actual loss and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said Engineer officer in charge and deducted from any payments due or to become due to the contractor: Provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, waive for a reasonable period the time limit originally set for completion and remit the charges for expenses of superintendence and inspection for so much time as in the judgment of the said Engineer officer in charge may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which prevented him from commencing or completing the work or delivering the materials within the period required by the contract: Provided, further, that nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided in the form of contract adopted and in use by the Engineer Department of the Army.

33. The contractor will be required to hold the United States harmless against all claims for the use of any patented article, process, or appliance in connection with the contract herein contemplated.

132 34. All available information in the possession of the United States will be given upon application. The United States will not guarantee the correctness of its information, and will not be responsible for the safety of the employees or material used by the contractor, nor for any damage done by or to them from any source or any cause. Bidders are expected to satisfy themselves as to the nature of the work to be done, and it will be assumed that proposals are based upon a thorough understanding of its character. Intending bidders are urged to visit the localities of the work and by personal inspection and inquiry fully to inform themselves as to the present and probable future conditions. No allowance or concession will be made for any lack of information on the part of the contractor regarding the work. The price bid shall be full compensation for furnishing all necessary labor, materials, and appliances of every description, and for doing all the work herein specified to the satisfaction of the engineer officer in charge, and shall include all risks and delays of whatever nature attending the execution of the work.

General description.

35. The shoal to be dredged is in San Pablo Bay, California, is about 5 miles in length, and has a least depth of 19 feet at low water. It extends from Pinole Point to Lone Tree Point, and is distant $1\frac{1}{4}$ to $1\frac{1}{2}$ statute miles N. W. of the points referred to. The average depth of the excavation is about 9 feet.

144 36. The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet; to deposit the spoil as near the south shore as practicable, within lines drawn between Pinole Point and Lone Tree Point, at such places as may be designated by the Engineer officer in charge; and to impound the material behind bulkheads or dykes of suitable construction, subject to approval by the Engineer officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract.

Dredging.

37. The depth of cutting will vary from 9 feet to 11 feet. The mean low-water depth to be obtained under this contract is 30 feet. The first cut will be made about 100 feet wide throughout the length of the shoal. All material above a depth of 30 feet must be removed. Payment will be made, however, at one-half of full contract rates, for all material shown in the final survey to have been removed

plant; provided, however, that the number of dredges may not be diminished at any time without first obtaining the consent of the Engineer officer in charge.

48. If at any time after the date set for beginning work it shall be found that the required minimum rate of progress is not being maintained, the Engineer officer in charge shall have the power, after due notice in writing to the contractor, to employ such additional plant or purchase such materials as may be necessary to ensure the completion of the work within the time specified, charging the cost thereof against such sums as may be due or become due to the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract as provided for in the form of contract to be entered into.

Time of work.

49. Work must be pushed continuously, except on Sundays and legal holidays. Night work will be permitted, when proper provision must be made, in all cases by the contractor, at his expense, for the comfort of the inspectors and other United States employees who may be on the work.

Measurements.

50. All material will be paid for by the cubic yard, measured in place. Price bid shall include all expenses of transportation, construction and maintenance of bulkheads, and disposal of the material as above provided.

Supervision.

51. The work will be conducted in strict accordance with the instructions of the Engineer officer in charge. All operations connected with the work will be under the immediate supervision of assistant engineers, inspectors, or other agents of the Engineer officer in charge.

52. In case of any doubt as to the intent or meaning of these specifications, the decision of the Engineer officer in charge shall be final.

53. No method of dredging which does not leave a clear channel of the specified depth behind the dredge will be permitted, and all material must be excavated and deposited under the supervisions of the Engineer officer in charge, or his agents. The contractor will be required to furnish, without expense to the United States, all stakes, piles, gauges, buoys, ranges, or other material, required for laying out and conducting the work of dredging and depositing, and to furnish men and boats to place and maintain them as directed by the Engineer officer in charge; he shall channel one pile at each 300 feet of its length. No work will be permitted unless the necessary gauges, ranges, buoys, etc., are in proper position and visible from the plant employed for that work. When required, the contractor is to furnish, without expense to the United States, boats and men to enable the inspectors to perform properly their duties.

150

Transportation of U. S. employees, etc.

54. When required, suitable transportation from San Francisco, and other points on shore, to be designated by the Engineer officer in charge, to and from all work, dredges and dumping grounds, and approved boards and lodgings for the United States employees engaged on the work, will be approved by the contractor, the board and lodgings to be paid for by the United States at a rate not to exceed \$20 per month. The cost of transportation is to be included in the price bid for doing the work.

Objectionable employees.

55. Any person employed by the contractor on the work who in the opinion of the Engineer officer in charge is disorderly or incompetent or guilty of improper conduct or work, or who disobeys or evades orders and instructions, shall, upon request of the Engineer officer in charge, be immediately discharged and not be re-employed on the work. Such discharge shall not form the basis of any claim for compensation or damages against the United States or any of its officers or employees.

Location of the work.

56. The location of the work to be done will be fixed by the Engineer officer in charge or his agents. Plainly marked tide gauges will be established in view of each part of the work, so that the proper depths may be at all times determined and ascertained. The level of mean low water will be established before the commencement of the work, and shall not be changed during its progress. Lines will be plainly marked by stakes, range marks, pile signals, buoys, or other suitable method; and in case these marks are removed by any cause, the contractor must replace them, as provided in paragraph 53.

Acceptance of the work.

57. Work will be accepted when completed to the satisfaction of the Engineer officer in charge. Should shoaling, however, afterwards occur in the accepted channel before the close of the contract, the contractor may be required to redredge such shoals to their proper depth, provided funds are available therefor, at the price bid for the excavation and deposit of material. The monthly payments shall not be construed as an acceptance of any part of the work.

Modification of specifications.

58. The right is reserved to make such minor changes in these specifications as may be necessary or expedient to carry out the intent of the contract, and no increase in price shall be paid the contractor on

account of such changes, except as provided in the form of contract to be entered into.

Proposals.

59. Bidders shall state on the form hereto appended a price per cubic yard, measured in place, for material excavated and deposited in accordance with these specifications, the price bid to include a bulkhead of timber, of approved design, to securely impound the material dredged, and to be full compensation for doing the work.

152 60. Bidders must satisfy the engineer officer in charge of their ability to do the work required, and that suitable and sufficient plant is under their control to carry out the contract in accordance with these specifications.

Removal of plant, obstructions, etc.

61. When required by the Engineer officer in charge, and upon the completion of the work, the contractor shall remove his plant and all appliances, including buoys, piles, gauge piles, ranges, etc., used in the work and shall leave the channel in good order, clear, secure and fit for navigation.

62. When required by the engineer officer in charge, the contractor shall remove all his machinery and appliances from the dumping grounds or places of deposit for excavated material.

63. Should the contractor, during the progress of the work, disturb or break up any materials, or sink, lose, dump, throw overboard, or misplace any materials, plant, machinery, etc., which in the opinion of the Engineer officer in charge may be dangerous to, or obstruct navigation, he shall forthwith recover and remove the same with the utmost possible dispatch. The contractor shall give immediate notice, with description and location of such obstructions, to the Engineer officer in charge, or the assistant engineer, and when required shall mark or buoy such obstructions until the same are removed.

Supervision by contractor.

64. The contractor must personally supervise the work during its progress, or have it constantly under the supervision of a careful, skilled and responsible representative, so as to insure prompt and proper compliance with the terms of the contract and specifications and all instructions given concerning the work by the Engineer officer in charge.

65. The contractor shall keep suitable lights each night, between sunset and sunrise, upon all his vessels and appliances anchored or stationed, on the work during the progress of the contract, and shall properly repair, at his own expense, all damages resulting from neglect to keep such lights.

San Francisco, Cal., August 25, 1902.

Proposal for dredging in San Pablo Bay, California.

San Francisco, Cal., 30th September, 1902.

To Lieutenant Colonel W. H. Heuer, Corps of Engineers, 41 Flood Building, San Francisco, Cal.

Sir: In accordance with your advertisement of August 25, 1902, inviting proposals for dredging in San Pablo Bay, California, and subject to all the conditions and requirements thereof, and of your specifications dated August 25, 1902, copies of both of which are hereto attached, and, so far as they relate to this proposal, are made a part of it, we (or) I propose to furnish all plant, labor, and materials, and do the work therein specified for eleven and 44/100 (11-44/100) cents per cubic yard.

We (or) I make this proposal with full knowledge of the kind, quantity, and quality of the articles required, and, if it is accepted, will, after receiving written notice of such acceptance, enter into contract within the time designated in the specification, with 154 good and sufficient sureties for the faithful performance thereof.

(Signature)

RUDOLPH AXMAN,

(Address)

San Francisco, Cal.

Guaranty to accompany proposal.

(When guarantors are individuals.)

We, Frederick L. Turpin, of the city and county of San Francisco, and State of California, and Irwin J. Truman, of the city and county of San Francisco, and State of California, hereby undertake that if the bid of *Rudolf Axman*, herewith accompanying, dated 30 September, 1902, for dredging in San Pablo Bay, California, be accepted, as to any or all of the items of supplies, materials, and services proposed to be furnished thereby, or as to any portion of the same, within sixty days from the date of the opening of proposals therefor, the said bidder *Rudolf Axman*, will, within ten (10) days after notice of such acceptance, enter into a contract with the proper officer of the United States to furnish such articles of supplies and materials and such services of those proposed to be furnished by said bid as shall be accepted, at the prices offered by said bid and in accordance with the terms and conditions of the advertisement inviting said proposals, and will give bond, with good and sufficient surety or sureties, as may be required for the faithful and proper fulfillment of such contract. And we bind ourselves, our heirs, executors, and administrators, jointly and severally, to pay to the United States, in case the said bidder shall fail to enter into such contract or give such bond within ten (10) days after
155 said notice of acceptance, the difference in money between the amount of the bid of said bidder on the articles or services

so accepted, and the amount for which the proper officer of the United States may contract with another party to furnish said articles and services, if the latter amount be in excess of the former.

Given under our hands and seals this 30 day of September, nineteen hundred and two.

In presence of—

J. S. Manly as to Frederick L. Turpin.

J. B. SHERRARD as to Irwin J. Truman.

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

I, Frederick L. Turpin, one of the guarantors named in the foregoing guaranty, do swear that I am pecuniarily worth the sum of twenty thousand dollars over and above all my debts and liabilities.

FREDERICK L. TURPIN.

Subscribed and sworn to before me this 30 day of September, 1902, at San Francisco.

J. S. MANLEY,

*U. S. Commissioner for the Northern
District of California at San Francisco.*

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

I, Irwin J. Truman, one of the guarantors named in the foregoing guaranty, do swear that I am pecuniarily worth the sum of
156 twenty thousand dollars over and above all my debts and liabilities.

IRWIN J. TRUMAN.

Subscribed and sworn to before me this 30 day of September, 1902, at San Francisco.

J. S. MANLEY,

*U. S. Commissioner for the Northern
District of California at San Francisco.*

I, J. S. Manley, do hereby certify that Frederick L. Turpin and Irwin J. Truman, the guarantors above-named, are personally known to me, and that to the best of my knowledge and belief, each is pecuniarily worth, over and above all his debts and liabilities, the sum stated in the accompanying affidavit subscribed by him.

J. S. MANLEY.

*U. S. Commissioner for the Northern
District of California at San Francisco.*

1. This agreement entered into this twenty-first day of November, 1902, between W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, of the first part and Rudolf Axman, of the city and county of San Francisco, State of California, of the second part; witnesseth:

That, in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said W. H.

Heuer, for and in behalf of the United States of America, and the said *Rudolf Axman*, for himself, his heirs, executors and administrators, do covenant and agree to and with each other as follows:

That he, the said *Rudolf Axman* will do such dredging in San Pablo Bay, California, as may be required by the said W.

157 H. Heuer, in accordance with the specifications hereunto annexed, and that he, the said W. H. Heuer, or his successor, will pay to the said *Rudolf Axman*, the sum of 11.44¢ per cubic yard for all such dredging as shall be done in strict accordance with the specifications hereunto annexed and as ordered and accepted by the said W. H. Heuer, or his agent.

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform with the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

3. The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraphs 31 and 46 of the attached specifications.

4. If in any event the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified therein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successors legally appointed, shall have power, with the sanction of the chief of engineers, to annul this contract by giving notice in writing to that effect to the party or parties, or either of them, of the second part, and upon the giving of such notice all payments to the

158 party or parties of the second part, under this contract, shall cease and all money or reserve percentage due, or to become due, the said party or parties of the second part by reason of this contract shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done, and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by said United States in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part, and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserve percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials by contract or otherwise in accordance with law.

5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the
159 work within a reasonable period to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said party of the first part and deducted from any payments due or to become due the party of the second part; provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restriction, or other unforeseeable causes of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work, or delivering the materials within the period required by the contract, but such waiver of the time and remission of the charges shall in no other manner affect the rights or obligations of the parties under this contract.

6. If at any time during the prosecution of the work it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether for labor
160 or material as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reason for such change and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War; Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part, or his successor, the prices and quantities thereof having been first *agree* upon by the contracting parties and approved by the Chief of Engineers.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that said final inspection and acceptance of and payment for, all of the material and work herein provided for, no prior inspection, payment or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material, or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and save the United States harmless from and against all and every demand or demands, of any nature or kind for, or on account of the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payments shall be made to the said party of the second part as prescribed in paragraph 30 of the specifications hereto attached and forming part of this agreement.

12. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract, either with the transferor, or with the transferee, but all rights of action for any breach of this contract by *Rudolf Axman* are reserved to the United States.

13. No member of or delegate to Congress, nor any person belonging to or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.

14. This contract shall be subject to approval by the Chief Engineers U. S. A.

In witness whereof, the parties aforesaid have hereunto placed their hands the day first hereinbefore written.

JNO. E. RICHARDS as to W. H. Heuer,
Colonel, Corps of Engineers, U. S. A.
G. KNIGHT WHITE as to *Rudolf Axman*.

(Endorsed:) Executed in quintuplicate.

Approved December 27, 1902.

[Seal]

G. S. GREUSOM,
Brigadier General, Chief of Engineers, U. S. Army.

(Endorsed in red ink:) December 26, 1903. Annulment authorized by endorsement on 44744-35. (Lieut. Col. Heuer.)

(Endorsed:) Articles of agreement entered into November 21, 1902, between Lieut. Col. W. H. Heuer, of the one part, and *Rudolf Axman* for dredging, in San Pablo Bay, for 11.44¢ per cubic yard.

[Testimony of W. H. Heuer—called for further direct examination.]

WITNESS.—(Continuing.) I am familiar with the signature of the brigadier general, Chief of Engineers, G. S. Gillespie, whose signature is endorsed at the bottom of the contract, approving the same.

After I was notified that this contract was approved, I gave to the defendant Rudolph Axman notice of such approval. This is a copy of a letter I sent to Mr. Axman notifying him the contract was approved, which letter was then and there received in evidence, marked plaintiff's Exhibit "B," and is in the words and figures following, to wit:

163

Plaintiff's Exhibit "B."

"San Pablo Bay, Cal., notification of approval of contract.

United States Engineer Office,
41 Flood Building, third floor.

SAN FRANCISCO, CAL., *Jan. 3, 1903.*

MR. RUDOLPH AXMAN,

5 Market Street, San Francisco.

SIR: I beg to notify you that your contract, dated November 21, 1902, for dredging San Pablo Bay, California, has been approved by the Chief of Engineers, U. S. Army, and that in accordance with the terms thereof work must be commenced within 60 days from the date of this notification.

I enclose herewith a copy of the contract, the receipt of which please acknowledge.

Very respectfully,

W. H. HEUER,
Lieut. Col., Corps of Engineers.

(One enclosure.)

Respectfully forwarded to the Chief of Engineers, U. S. Army, in compliance with Circular No. 15, C. of E., August 4, 1899.

W. H. HEUER,
Lieut. Col., Corps of Engineers."

I mailed this letter the day it bears date.

Q. After the making of the contract and the execution of the contract, what did you do in the way of designating the places where the spoil to be dredged was to be deposited?

164 A. I simply required a bulkhead to be built starting at Point Pinole, as specified in the contract, in a direction generally towards Lone Tree Point.

(Continuing.) I had a talk with Mr. Axman in my office in the Flood Building in San Francisco, regarding his proceeding with the work, as to where the spoils should be deposited, and the result of that conversation was that we mutually agreed—it was satisfactory to him and to the Government—to build that bulkhead at the place he built it. I did not, after this conversation with Mr. Axman, go upon the ground and actually designate this place for the deposit of the spoil. My assistant, Mr. Demeritt, did. Some 800 feet, more or less, in length of bulkhead was built, behind which spoil to be deposited, started at Point Pinole and running in a general direction

towards Lone Tree Point. The line of this bulkhead that was constructed was all told about 2,400 linear feet out from Pinole Point; that is, the further end of the bulkhead was 2,400 feet from Point Pinole. One end was at Point Pinole. It had an angle in it. The line of the bulkhead was prepared and started in such manner that it led in a general direction towards Lone Tree Point. I have a map of that particular region. It displays the location of the objects in that vicinity, showing the location of Lone Tree and Pinole Points and the Bay. It is a Coast Survey Chart of San Pablo Bay, and it shows these various objects on it (pointing) in the channel of San

Pablo Bay, but the particular route of the channel which was to
165 be dug is not marked upon it. It has these two points marked on it, and the depths through San Pablo Bay. The distances are placed on there proportionately. There is a scale to the map, and by using that scale you can make any distance. They are correctly delineated there. (Here said map referred to by the witness as aforesaid was offered and received in evidence, and marked Plaintiff's Exhibit "C," and made part of the record.)

WITNESS (continuing). Point Pinole and Lone Tree Point are marked on this map. The work to be done in this particular case was to dredge a channel approximately five miles in length near the center of the channel called San Pablo Bay, and lying out from Lone Tree Point. I had general supervision of the work under the contract that was entered into between the Government and Mr. Axman. I located the place in this proposed channel where Mr. Axman was to begin his dredging, before the contract was let. Under this contract Mr. Axman dug part of a channel facing there (indicating on Plaintiff's Exhibit "C"), towards its left-hand end of the proposed cut, and took out all told a little less than 200,000 cubic yards of material, most of which he deposited behind this bulkhead that he constructed. This bulkhead was constructed from Pinole Point outwardly and extended towards Lone Tree Point. I subsequently annulled this contract, or gave notice of the fact that the contract was annulled to Mr. Axman. Counsel for defendants here stated that

this notice had been destroyed in the general conflagration in
166 San Francisco of April 18th, 1906. I received a telegram from the Chief of Engineers, General Gillespie, of Washington, authorizing me to annul this contract. That telegram was burned. I subsequently received a communication from Washington, which was on the wrapper of the correspondence, with reference to the annulment, and that is a wrapper which I received from Washington confirming the telegram. I received it subsequent to the telegram. The wrapper is dated December 26th, 1903, and the telegram is dated December 23d, 1903. Axman, the contractor, commenced work on February 24th, 1903. Between that date and the date I gave him notice to the effect that the contract had been annulled less than 200,000 cubic yards had been dredged by him. Prior to the time that I gave this notice of annulment, I had come to a conclusion in regard to the rate of progress made by the defend-

ant *Rudolf Axman*. The opinion that I arrived at was that he was not carrying out his contract. His contract required at least 100,000 cubic yards a month of excavation. He worked nine months and in nine months he got out less than 200,000 cubic yards.

Q. You state in this notice, which I have referred to, that the annulment is in accordance with paragraph four of the contract. You acted under paragraph four?

A. I presume so.

Q. That he was not proceeding faithfully and diligently to carry out the work?

A. Exactly.

167 The plaintiff offered the following letter which was received in evidence, and marked Plaintiff's Exhibit "E":

Plaintiff's Exhibit "E."

"United States Engineer Office,

41 Flood Building, Third Floor,

SAN FRANCISCO, CAL., December 24, 1903.

Mr. *Rudolf Axman*,

Contractor,

5 Market Street, San Francisco, Cal.

SIR:

I hereby notify you that the contract entered into by you with me on November 21, 1902, for dredging in San Pablo Bay, California, is this day annulled, as provided for in paragraph 4 of the contract, on account of failure to comply with the requirements of the specifications.

Very respectfully,

W. H. HEUER,

Lieut. Colonel, Corps of Engineers.

A true copy.

WM. H. HARTS,

Captain, Corps of Engineers."

The plaintiff also offered so much of the following appearing upon the wrapper hereinbefore referred to, which was received and marked Plaintiff's Exhibit "F":

Plaintiff's Exhibit "F."

"DECEMBER 26, 1903.

1. Respectfully returned to Lieutenant Colonel Heuer.

168 2. Confirming telegram of December 23, 1903. Lieutenant Colonel Heuer is authorized to annul the contract of *Rudolf Axman* for dredging in San Pablo Bay, by giving notice in writing to both the contractor and surety.

3. The work should be readvertised and a careful account kept of any increased cost or loss and damage to the United States by reason of the contractor's failure to complete the original contract."

I will now offer a letter addressed to the American Bonding Company by Col. Heuer. This is a copy. I offer this copy, the original of which was forwarded to the American Bonding Company on December 24th, 1903. It says here "December 24th, 1902" (addressing the witness). That is a mere clerical error, I suppose, Colonel?

A. Yes, sir.

The letter was received in evidence and marked Plaintiff's Exhibit "D," and is in the words and figures following, to wit:

Plaintiff's Exhibit "D."

"United States Engineer Office,

41 Flood Building, Third Floor.

SAN FRANCISCO, CAL., December 24, 1902.

AMERICAN BONDING COMPANY,

405 Montgomery Street, San Francisco, Cal.

SIRS: I hereby notify you that the contract entered into by me on November 21, 1902, with *Rudolf Axman*, contractor, for dredging in San Pablo Bay, California, for the faithful performance of which you entered into a bond, dated said 21st day of November, 1902, has this day been annulled, in accordance with paragraph 4 of the contract, on account of failure to comply with the requirements of the specifications.

Very respectfully,

W. H. HEUER,

Lieut. Col., Corps of Engineers.

A true copy.

WM. W. HARTS,

Captain, Corps of Engineers."

I was not on the ground all the time that Mr. Axman was there at work. My assistants and employees were there from time to time.

Q. Specification 57 is to the effect—I call your attention to it so as to narrow your testimony to that point—"The location of the work to be done will be fixed in advance by the engineer officer in charge or his agents. Plainly marked tide gauges will be established in view of each part of the work, so that the proper depths may be at all times determined and ascertained. The level of mean low water will be established before the commencement of the work, and shall not be changed during its progress. Lines will be plainly marked by stakes, range marks, pile signals, buoys or other suitable method; and in case these marks are removed by any cause, the contractor must replace them, as provided in paragraph 54." Those preliminaries were gone through?

A. They were.

Q. Prior to the commencement of this work?

A. Yes, sir.

170 WITNESS.—(Continuing.) Approximately, the defendant *Rudolf Axman* dredged on his contract 196,000 cubic yards.

This is a close approximation. During none of these months did the defendant *Rudolf Axman* average the minimum rate prescribed in the specifications.

Q. Do you know what amount of material he had dredged under the provisions of this contract at the time he removed the dredge "*Caledonian*" from the works on June 22d, 1903?

A. He removed less than 100,000 cubic yards in this four months. I am not certain whether or not any dredging was done between June 22d and October 28th. My letters will show whether there was or not. Approximately there was no dredging done in the channel between June 23d or thereabouts, when he took his dredge away, and October 1st. The defendant Axman did not, to my knowledge, and never did to me, protest in any way after I had given him notice of annulment. On the contract being annulled, I wrote a letter to Washington notifying Washington that the contract had been annulled and requested permission to readvertise the work, obtained the necessary authority, and readvertised the work. The first time the work was readvertised, recollecting the contract was cancelled on December 23d, the bids for letting a new contract were opened on March 2d. I received either three or four bids. The lowest bid

171 bid from the Coast Contracting Company, or Coast Construction Company, and it did not comply with the specifications.

In other words, the advertisement and specifications at that opening of the bids on March 2d were identical with the specifications of the Axman contract. The lowest bidder of the three or four bids did not, in making his bid, agree to dump behind that line extending from Point Pinole to Lone Tree Point, but specified in his bid he would dump elsewhere. That was the lowest bid. That was not what I asked bids for. The other two or three people who did bid in accordance with the requirements of the contract agreed to dump behind the bulkhead, but the prices bid were extortionate, and therefore all bids were rejected. Then I immediately advertised a third time, and those bids were opened on May 24th. The advertisements in each case for letting the contract were the usual advertisements required by law and regulations of the department for work of this character. I submitted copies of the specifications for the doing of the work to everybody that bid or intended to bid. We not only advertised in the papers asking them to bid, but sent a copy of those printed specifications to every contractor that we knew of that had a dredge in California, for fear they might not notice it in the newspaper. I relet the contract.

Mr. CLARK.—Q. This is the original contract, Colonel, executed by the North American Dredging Company?—A. Correct.

172 Mr. CLARK.—We offer the contract between the United States of America, executed through Col. W. H. Heuer, acting on behalf of the Government, and the North American Dredging Company.

To which the defendants then and there severally objected upon the ground that it is incompetent, irrelevant and immaterial, not within the issues of the pleadings, and that the issue of the pleadings is that after the annulment of the contract the work was readvertised, and on June 21st a contract was made with the North American Dredging Company of San Francisco to do the work left undone by the defendants herein; that the contract shown to have been made with the defendant Axman was to dig a channel 27,000 feet in length, 300 feet wide, and 30 feet deep, and deposit the spoil at a particular place to be designated by the engineer in charge between Pinole Point and Lone Tree Point, behind bulkheads to be built by him. The allegation of the complaint is—they readvertised, and let the work to be done. The contract now offered in evidence shows that the work let in the contract offered was to dig a channel 27,000 feet in length, and to deposit the spoil at a certain place called "The Sisters," in depth of water exceeding 50 feet deep. Furthermore, according to Plaintiff's Exhibit "A," it provided that if there was any change whatever in such contract, it should be agreed upon by the contracting parties, sanctioned by the chief engineer and put in writing, and there is no evidence here that the changes contained in the document now offered were agreed upon by the contracting parties, sanctioned by the chief engineer and put in writing.

173 The court reserved its ruling on the objection until the conclusion of the testimony and allowed the contract to be received provisionally, subject to the objection.

Said contract was (provisionally) received in evidence and marked Plaintiff's Exhibit "G," and is in the words and figures following, to wit:

Plaintiff's Exhibit "G."

Improving San Pablo Bay, Cal.

Advertisement.

U. S. Engineering Office.

SAN FRANCISCO, CAL., April 21, 1904.

Sealed proposals for dredging in San Pablo Bay, California, will be received here until 12, noon, Tuesday, May 24, 1904. Information on application.

W. H. HEUER,

Lieut. Col. Eng'rs.

Specifications.

General instructions for bidders.

1. The attention of bidders is especially invited to the acts of Congress approved February 26, 1885, and February 23, 1887, as

printed in vol. 23, page 332, and vol. 24, page 414, *United States at Large*, which prohibit the importation of foreigners and aliens, under contract or agreement, to perform labor in the United States or Territories, or the District of Columbia.

2. Preference will be given to articles or materials of domestic production, conditions of quality and price being equal, including in the price of foreign articles the duty thereon.

174 3. No proposal will be considered unless accompanied by a guaranty which should be in manner and form as directed in these instructions.

4. All bids and guaranties must be made in duplicate, upon printed forms to be obtained at this office.

5. The guaranty attached to each copy of the bid must be signed by an authorized surety company, or by two responsible guarantors, to be certified as good and sufficient guarantors by a judge or clerk of a United States court, United States district attorney, United States commissioner, or judge or clerk of a State court of record, with the seal of said court attached.

6. A firm as such will not be accepted as surety, nor a partner for a copartner or firm of which he is a member. Stockholders who are not officers of a corporation may be accepted as sureties for such corporation. Sureties, if individuals, must be citizens of the United States.

7. When the principal, a guarantor, or a surety, is an individual, his signature to a guaranty or bond shall have affixed to it an adhesive seal. Corporate seals will be affixed by corporations, whether principals or sureties. All signatures to proposals, guaranties, contracts, and bonds should be written out in full, and each signature to guaranties, contracts, and bonds should be attested by at least one witness, and, when practicable, by a separate witness to each signature.

8. Each guarantor will justify in the sum of twenty thousand (20,000) dollars. The liability of the guarantors and bidder
175 is determined by the act of March 3, 1883, 22 Statutes, 487, chap. 120, and is expressed by the guaranty attached to the bid.

9. A proposal by a person who affixes to his signature the word "president," "secretary," "agent," or other designation, without disclosing his principal, is the proposal of the individual. That by a corporation should be signed with the name of the corporation, followed by the signature of the president, secretary, or other person authorized to bind it in the matter, who should file evidence of his authority to do so. That by a firm should be signed with the firm name, either by a member thereof or by its agent, giving the names of all members of the firm. Anyone signing the proposal as the agent of another or others must file with it legal evidence of his authority to do so.

10. The place of residence of every bidder, and post-office address, with county and State, must be given after his signature.

11. All prices must be written as well as expressed in figures.

12. One copy each of the advertisement, the instructions for bidders, and the specifications, all of which can be obtained at this office on application by mail or in person, must be securely attached to each copy of the proposal, and be considered as comprising a part of it.

13. Proposals must be prepared without assistance from any person employed in or belonging to the military service of the United States or employed under this office.

176 14. No bidder will be informed, directly or indirectly, of the name of any person intending to bid, or to whom information in respect to proposals may have been given.

15. All blank spaces in the proposal and bond must be filled in, and no change shall be made in the phraseology of the proposal, or addition to the items mentioned therein. Any conditions, limitations, or provisos attached to proposals will be liable to render them informal and cause their rejection.

16. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

17. If a bidder wishes to withdraw his proposal he may do so before the time fixed for the opening, without prejudice to himself, by communicating his purpose in writing to the officer who holds it, and when reached, it shall be handed to him or his authorized agent, unread.

18. No bids received after the time set for opening of proposals will be considered.

19. The proposals and guaranties must be placed in a sealed envelope marked "Proposals for dredging in San Pablo Bay, California, to be opened May 24, 1904," and inclosed in another sealed envelope addressed to "Lieut. Col. W. H. Heuer, Corps of Engineers, 41 Flood Building, San Francisco, Cal.," but otherwise unmarked. It is suggested that the inner envelope be sealed with sealing wax.

20. It is understood and agreed that the quantities given are approximate only, and that no claim shall be made against the United

177 States on account of any excess of deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of the weather, and all other contingencies.

21. The United States reserves the right to reject any and all bids, and to waive any informality in the bids received; also to disregard the bid of any failing bidder or contractor, known as such to the Engineer Department, or any bid which is palpably unbalanced or obviously below what the work can be done for, or the bid of any bidder who shall fail to produce, when called upon to do so, evidence satisfactory to the Engineer officer in charge of the said bidder's

ability to do the contemplated work *with* the required time, including his control of the necessary means and equipment. The failure of a bidder to make satisfactory progress or to complete on time similar work under previous contracts with the United States will be duly considered in canvassing bids and may be a valid cause for the rejection of his proposal. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

22. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security in an amount of fifty thousand dollars (\$50,000) within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

23. The sureties, if individuals, are to make and subscribe affidavits of justification on the back of the bond to the contract, and they must justify in amounts which shall aggregate double the amount of the penal sum in the bond.

24. Bidders are invited to be present at the opening of the bids.

General conditions.

25. A copy of the advertisement, and of the specifications, instructions, and conditions will be attached to the contract and form a part of it.

26. The contractor should, within ten days from the award of the contract, furnish the office with the post-office address to which communications should be sent.

27. Transfers of contracts, or of interest in contracts, are prohibited by law.

28. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

179 29. The decision of the Engineer officer in charge as to quality and quantity shall be final.

30. Payments will be made monthly, subject to the provisions of paragraph 47 of these specifications. A percentage of ten (10) per centum will be *reversed* from each payment as provided for in paragraph 46 of these specifications.

31. The contractor will be required to commence work under the contract within sixty days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute

the said work with faithfulness and energy, and to complete it within twenty-three (23) months after the date of commencement.

32. Unless extraordinary and unforeseeable conditions supervene, the time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital, and experience. If the work is not completed within the period stipulated in the contract, the Engineer officer in charge may, with the prior sanction of the Chief of Engineers, waive the time limit and permit the contractor to finish the work within a reasonable period, to be determined by the said Engineer officer in charge. Should the original time limit be thus waived, all expenses for inspection and superintendence and other actual loss and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said Engineer officer in charge and deducted from any payments due or to become due to the contractor: Provided,

180 however, that the party of the first part may, with the prior sanction of the Chief of Engineers, waive for a reasonable period the time limit originally set for completion and remit the charges for expenses of superintendence and inspection for such time as in the judgment of the said Engineer officer in charge may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which prevented him *for* commencing or completing the work or delivering the materials within the period required by the contract: Provided, further, that nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided in the form of contract adopted and in use by the Engineer Department of the Army.

33. The contractor will be required to hold the United States harmless against all claims for the use of any patented article, process, or appliance in connection with the contract herein contemplated.

34. All available information in the possession of the United States will be given upon application. The United States will not guarantee for correctness of its information, and will not be responsible for the safety of the employees or materials used by the contractor, nor for any damage done by or to them from any source or any cause. Bidders are expected to satisfy themselves as to the nature of the work to be done, and it will be assumed that proposals are based upon a thorough understanding of its character. In-

181 tending bidders are urged to visit the localities of the work, and by personal inspection and inquiry fully to inform themselves as to the present and probable future conditions. No allowance or concession will be made for any lack of information on the part of the contractor regarding the work. The price bid shall be full

compensation for furnishing all necessary labor, materials, and appliances of every description and for doing all the work herein specified to the satisfaction of the Engineer officer in charge, and shall include all risks and delays of whatever nature attending the execution of the work.

General description.

35. The shoal to be dredged is in San Pablo Bay, California, is about 5 miles in length, and has a least depth of 19 feet at low water. It extends from Pinole Point to Lone Tree Point, and is distant $1\frac{1}{2}$ to $1\frac{3}{4}$ statute miles NW. of the points referred to.

36. The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet and either

(a) To deposit the spoil as near the south shore as practicable, within lines drawn between Point Pinole and Lone Tree Point, at such places as may be designated by the Engineer officer in charge; and to impound the material behind bulkheads of suitable construction, subject to approval by the Engineer officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract, or

182 (b) To deposit the spoil in water exceeding 50 feet in depth, lying within the area bounded by lines drawn from The Sisters to Point San Pablo, thence to Marin Islands, and thence back to The Sisters. The top of any pile shall not be higher than 40 feet below the level of low tide.

Bids will be received for either place of deposit, but will not be considered for any other place of deposit than those specified, and bidders must distinctly state in their bid in which place they propose to deposit the spoil. The right is reserved to award the contract, irrespective of price, for such place of deposit as may be considered most advantageous to the United States.

37. A part of the channel near its southwest end, having a length of 8,000 feet, a width varying from 70 to 140 and a depth of 30 feet below mean low-tide level, containing approximately 165,000 cubic yards, was dredged recently under a former contract which was annulled. The area over which dredging was done, which can be seen on a map on file in this office, will not require redredging unless filling occurs above the grade plane, and then only such material as fills above said grade plane before the completion of the contract will have to be redredged and deposited at the unit price per cubic yard, place measurement, mentioned in the new contract.

Dredging.

38. The depth of cutting will vary from 0 feet to 11 feet. The mean low-water depth to be obtained under this contract is 30 feet. The first cut will be made about 100 feet wide throughout the length of the shoal. All material above a depth of 30 feet must

183 be removed. Payment will be made, however, at one-half of full contract rates, for all material shown in the final survey to have been removed from between the depths of 30 and 31 feet. Side slopes of 3 horizontal to 1 vertical will be permitted along the lines of the proposed completed channel and will be paid for only if actually made.

39. Material dredged outside the designated lines of excavation, below the depths provided in paragraph 38, or deposited otherwise than as herein specified, direct and agreed upon, will not be paid for. The total amount to be dredged is estimated at 2,285,000 cubic yards, more, or, less.

Deposit of material.

40. All dredged material is to be deposited within the limits of the area described in paragraph 36. The method of deposit will be subject to approval by the Engineer officer in charge.

41. In place of deposit (a) the part of the area available for deposit of material from scows has an average width of about $\frac{3}{4}$ of a mile. Its distance from the site of dredging varies from 1 to 2 miles.

In place of deposit (b) the deep part of the area available for the deposit of material from scows is triangular in shape, covering an area of about one square mile. Its distance from the nearest point of the dredging is about 5 statute miles. The location of the places of deposit, the depth of water therein, and the location of the dredging, are shown on maps on file in this office.

42. Any deposit outside of authorized grounds will render the contract liable to be annulled.

184

Character of material.

43. No guarantee is given as to the character of material to be dredged. It is believed to be sand and slickens. No claim shall be made by the contractor on account of material moved by the action of the currents.

Amount of dredging.

44. The work is to be done under the following provisions of the river and harbor act of June 13, 1902:

Improving San Pablo Bay, California, by constructing a channel between the Straits of Carquinez and the Golden Gate off Point Pinole, Point Wilson, and Lone Tree Point, three hundred feet in width and thirty feet in depth, in accordance with a report submitted in House Document numbered eighty-nine, Fifty-sixth Congress, first session, one hundred thousand dollars; provided, that a contract or contracts may be entered into by the Secretary of War for the completion of said project, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate two hundred and eighty-one thousand dollars, exclusive of the amount herein appropriated.

45. Three hundred thousand dollars has been appropriated for the work, and there is now two hundred and ninety-six thousand dollars, less engineering expenses, available for dredging the channel. It is expected that Congress will, in accordance with the provisions of the act, make appropriations at such time as to permit payments for the

work done under these specifications to be made without interruption or delay; but the contractor must assume all risks as to time of payments. In case available funds for payment of contractor become exhausted before the completion of the contract, the Engineer officer in charge will give written notice to the contractor that the work may be suspended; but if the contractor so elects, he may continue work under the conditions of the specifications so long as funds for proper superintendence and inspection are available, and no longer; with the understanding, however, that no payments will be made for such work until additional funds have been provided in sufficient amount, at which time the Engineer officer in charge will give thirty days' written notice to the contractor that work must be resumed. It is distinctly understood and agreed that the United States is in no case to be made liable for damages under or in connection with this contract on account of delay in payments on same due to any lack of available funds.

46. With the funds now available, and such as may hereafter be appropriated, payments, less ten per centum, will be made monthly for all material removed from the cut above the grade plane, provided, a satisfactory rate of progress, as described in paragraph 47 of these specifications, has been made.

The ten per centum deductions will be made monthly until 1,400,000 cubic yards of material, measured in place, have been excavated, accepted, and paid for; thereafter, monthly payments will be made in full without further deductions, provided satisfactory progress has been maintained. The retained percentages will not be paid until the satisfactory completion of the contract.

Progress of the work.

47. The work must progress at the rate of at least 100,000 cubic yards per month, and to entitle the contractor to the monthly payments provided for in paragraph 30 of these specifications, an average of not less than 100,000 cubic yards per month must have been dredged and deposited; the calculation of averages to be made from the day on which the contract requires the work to be commenced.

Plant.

48. The contractor will be required to provide and maintain such a plant as the Engineer officer in charge shall deem necessary for the vigorous prosecution of the work. The plant shall be at all times subject to the inspection and approval of the Engineer officer

in charge. If deemed insufficient or inadequate, the contractor will be required to increase or change the plant to the extent found necessary. All plant and appliances must be kept in good condition in every respect. The contractor shall give immediate notice in writing to the Engineer officer in charge of the arrival upon or withdrawal from the work of any portion of his plant; provided, however, that the number of dredges, scows, and towboats may not be diminished at any time without first obtaining the consent of the Engineer officer in charge.

49. If at any time after the date set for beginning work it shall be found that the required minimum rate of progress is not
187 being maintained, the Engineer officer in charge shall have the power, after due notice in writing to the contractor, to employ such additional plant or purchase such materials as may be necessary to insure the completion of the work within the time specified, charging the cost thereof against such sums as may be due or become due to the contractor. This provision, however, shall not be construed to effect the right of the United States to annul the contract as provided for in the form of contract to be entered into.

Time of work.

50. Work must be pushed continuously, except on Sundays and legal holidays. Night work will be permitted, when proper provision must be made, in all cases by the contractor at his expense, for the comfort of the inspectors and other United States employees who may be on the work.

Measurement.

51. All material will be paid for by the cubic yard, measured in place. Price bid shall include all expenses of transportation, construction and maintenance of bulkheads, and disposal of the material as above provided.

Supervision.

52. The work will be conducted in strict accordance with the instructions of the Engineer officer in charge. All operations connected with the work will be under the immediate supervision of assistant engineers, inspectors, or other agents of the Engineer officer in charge.

188 53. In case of any doubt as to the intent or meaning of these specifications, the decision of the Engineer in charge shall be final.

54. No method of dredging which does not leave a clear channel of the specified depth behind the dredge will be permitted, and all material must be excavated and deposited under the supervision of the Engineer officer in charge or his agents. The contractor will be required to furnish, without expense to the United States, all stakes, piles, *gauges*, buoys, ranges, or other material, required for laying

out and conducting the work of dredging and depositing, and to furnish men and boats to place and maintain them as directed by the Engineer officer in charge; he shall also furnish, drive, and maintain, on one side of the proposed channel, one pile at each 500 feet of its length, such piles to extend not less than 10 feet above mean high-water level. No work will be permitted unless the necessary gauges, ranges, buoys, etc., are in proper position and visible from the plant employed for the work. When required, the contractor is to furnish, without expense to the United States, boats and men to enable the inspectors to perform properly their duties.

Transportation of U. S. employees, etc.

55. When required, suitable transportation from San Francisco, and other points on shore, to be designated by the Engineer officer in charge, to and from all work, dredges, and dumping grounds, and approved board and lodgings for the United States employees
189 engaged on the work, will be provided by the contractor, the board and lodgings to be paid for by the United States at a rate not to exceed \$20 per month. The cost of transportation is to be included in the price bid for doing the work.

Objectionable employees.

56. Any person employed by the contractor on the work who, in the opinion of the Engineer officer in charge, is disorderly or incompetent or guilty of improper conduct or work, or who disobeys or evades orders and instructions, shall, upon request of the Engineer officer in charge, be immediately discharged and not be reemployed on the work. Such discharge shall not form the basis of any claim for compensation or damage against the United States or any of its officers or employees.

Location of the work.

57. The location of the work to be done will be fixed in advance by the Engineer officer in charge or his agents. Plainly marked tide gauges will be established in view of each part of the work, so that the proper depths may be at all times determined and ascertained. The level of mean low water will be established before the commencement of the work, and shall not be changed during its progress. Lines will be plainly marked by stakes, range marks, pile signals, buoys, or other suitable method; and in case these marks are removed by any cause, the contractor must replace them, as provided in paragraph 54.

Acceptance of the work.

58. Work will be accepted when completed to the satisfaction of the Engineer officer in charge. Should shoaling, however, afterwards occur in the accepted channel before the close
190

of the contract, the contractor may be required to redredge such shoals to their proper depth, provided funds are available therefor, at the price bid for the excavation and deposit of material. The monthly payments shall not be construed as an acceptance of any part of the work.

Modification of specifications.

59. The right is reserved to make such changes in these specifications as may be necessary or expedient to carry out the intent of the contract, and no increase in price shall be paid the contractor on account of such changes, except as provided in the form of contract to be entered into.

Proposals.

60. Bidders shall state on the form hereto appended a price per cubic yard, measured in place, for material excavated and deposited in accordance with the specifications, the price bid to include a bulkhead of timber, of approved design, to securely impound the material dredged, and to be full compensation for doing all the work mentioned in these specifications.

61. Bidders must satisfy the Engineer officer in charge of their ability to do the work required, and that suitable and sufficient plant is under their control to carry out the contract in accordance with these specifications.

Removal of plant, obstructions, etc.

62. When required by the Engineer officer in charge, and
191 upon the completion of the work, the contractor shall remove his plant and all appliances, including buoys, piles, guage piles, ranges, etc., used in the work, and shall leave the channel in good order, clear, secure and fit for navigation.

63. When required by the Engineer officer in charge, the contractor shall remove all his machinery and appliances from the dumping grounds or places of deposit for excavation material.

64. Should the contractor, during the progress of the work, disturb or break up any materials, or sink, lose, dump, throw overboard, or misplace any materials, plant, machinery, etc., which in the opinion of the Engineer officer in charge may be dangerous to, or obstruct, navigation, he shall forthwith recover and remove the same with the utmost possible dispatch. The contractor shall give immediate notice, with description and location of such obstructions, to the Engineer officer in charge, or the Assistant Engineer, and when required shall mark or buoy such obstructions until the same are removed.

SUPERVISION BY CONTRACTOR.

65. The contractor must personally supervise the work during its progress, or have it constantly under the supervision of a careful,

skilled, and responsible representative, so as to insure prompt and proper compliance with the terms of the contract and specifications and all instructions given concerning the work by the Engineer officer in charge.

66. The contractor shall keep suitable lights each night, between sunset and sunrise, upon all his vessels and appliances anchored or stationed on or moving about the work during the progress of the contract, and shall properly repair, at his own expense, all damages resulting from neglect to keep such lights.

San Francisco, Cal., April 21, 1904.

Proposal for dredging in San Pablo Bay, California.

SAN FRANCISCO, May 24th, 1904.

To Lieutenant Colonel W. H. HEUER,

Corps of Engineers, 41 Flood Building, San Francisco, Cal.

SIR: In accordance with your advertisement of April 21, 1904, inviting proposals for dredging in San Pablo Bay, California, and subject to all the conditions and requirements thereof, and of your specifications dated April 21, 1904, copies of both of which are hereto attached, and, so far as they relate to this proposal, are made a part of it, we (or) I propose to furnish all plant, labor, and materials, do the work therein specified and deposit the spoils in place of deposit (a) for ——— cents per cubic yard; or to furnish all plant, labor, and materials, do the work therein specified, and deposit the spoils in place of deposit (b) for (14.48c) four and 48/100 cents per cubic yard.

We (or) I make this proposal with a full knowledge of the kind, quantity, and quality of the articles required, and, if it is accepted, will, after receiving written notice of such acceptance, enter into contract within the times designated in the specification, with good and sufficient sureties for the faithful performance thereof.

NORTH AMERICAN DREDGING CO.,

(Signature) By R. A. PERRY,

G. E. N. Manger,

(Address) 106 Market St., S. F., Cal.

193

Guaranty to accompany proposal.

(When guarantor is a corporation.)

The United States Fidelity and Guaranty Company of Baltimore, a corporation existing under the laws of the State of Maryland, hereby undertake that if the bid of North American Dredging Co., herewith accompanying, dated May 24th, 1904, for dredging in San Pablo Bay, California, be accepted as to any or all of the items of supplies, materials, and services proposed to be furnished thereby, or as to any portion of the same, within sixty days after the date of the opening of proposals therefor, the said bidder North America

Dredging Co. will, within ten (10) days after notice of such acceptance, enter into a contract with the proper officer of the United States to furnish such articles of supplies and materials and such services of those proposed to be furnished by said bid as shall be accepted, at the prices offered by said bid and in accordance with the terms and conditions of the advertisement inviting said proposals, and will give bond with good and sufficient surety or sureties, as may be required, for the faithful and proper fulfillment of such contract. And said corporation hereby binds itself and its successors to pay to the United States, in case the said bidder shall fail to enter into such contract or give such bond within ten (10) days after said notice of acceptance, the difference in money between the amount of the bid of said bidder on the articles or services so accepted and the amount for which the proper officer of the United

States may contract with another party to furnish said articles
194 and services, if the latter amount be in excess of the former.

In witness whereof, the name and corporate seal of said corporation has been hereto affixed this 21st day of May, 1904, and these presents duly signed by its atty. in fact, pursuant to a resolution of its board of directors passed on the 11th day of January, A. D. 1904, a copy of the record of which is on file in the War Department.

THE UNITED STATES FIDELITY AND GUARANTY CO.,
By FRANK M. HALL, *Its Atty. in Fact.*

[L. S.]

Attest:

D. F. BELDEN.

(Executed in duplicate.)

1. The president or officer authorized to sign for the corporation.
2. The board of directors or other governing body of the corporation.
3. Here affix the corporate seal.

1. This agreement, entered into this 21st day of June, 1904, between W. H. Heuer, colonel, Corps of Engineers, United States Army, of the first part, and North American Dredging Company, a corporation, existing under the laws of the State of New Jersey, of the second part, witnesseth:

That, in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said W. H. Heuer, for and in behalf of the United States of America, and
195 the said North American Dredging Company, for itself and its successors, do covenant and agree to and with each other as follows:

That the said North American Dredging Company will do such dredging in San Pablo Bay, California, as may be required by the said W. H. Heuer, in accordance with the specifications hereunto annexed, and deposit the spoils in places of deposit (b) as described in paragraph 36 in said specifications hereunto annexed; and that he, the said W. H. Heuer, or his successor, will pay to the said North

American Dredging Company, the sum of 14.48¢ per cubic yard for all such dredging as shall be done in strict accordance with the specifications hereunto annexed, and is ordered and accepted by the said W. H. Heuer, or his agent.

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform with the specifications set forth in this contract shall be rejected. The decision of the Engineer officer in charge as to quality and quantity shall be final.

3. The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraphs 31 and 47 of the attached specifications.

4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material, or the performance of the work, on the day specified herein, or shall, in the judgment of the Engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case the party of the first part, or his successor legally appointed, shall have power with the sanction of the Chief of Engineers to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part, under this contract, shall cease and all money or reserve percentage due, or to become due the said party or parties of the second part by reason of this contract shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by said United States in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part, and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserve percentage retained as aforesaid; and upon the giving of the said notice, the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials by contract, or otherwise, in accordance with law.

5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period to be determined by the said party

of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said party of the first part and deducted from any payments due or to become due the party of the second part; provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restriction, or other unforeseeable causes of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work or delivering the materials within the period required by the contract, but such waiver or the time and remission of the charges shall in no other manner affect the rights or obligations of the parties under this contract.

198 6. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether for labor or material as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reason for such change and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War; provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part, or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

199 9. It is further agreed by and between the parties hereto that said final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material, or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and save the United States harmless from and against all and every demand or demands, of any nature or kind for, or on account of the use of any patented invention, article or process included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payments shall be made to the said party of the second part as prescribed in paragraphs 30, 46, and 47 of the specifications hereto attached and forming part of this agreement.

12. Neither this contract, nor any interest therein, shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract, either with the transferrer or with the transferee, but all rights of action for any breach of this contract by the North American Dredging Company are reserved to the United States.

13. No member of or delegate to Congress, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom, but this stipulation, so far as it relates to members of or delegates to Congress, is not to be construed to extend to this contract.

14. This contract shall be subject to approval by the Chief of Engineers, U. S. A.

In witness whereof the parties aforesaid have hereunto placed their hands the day first hereinbefore written.

WARREN BROWN,

W. A. H. CONNER,

Witnesses as to W. H. Heuer,

Colonel, Corps of Engineers, U. S. A.

NORTH AMERICAN DREDGING CO.

R. A. PERRY, *General Manager.*

(Endorsed:) Executed in quintuplicate.

Approved July 19, 1904.

[SEAL.]

A. MACKENZIE,

Brigadier, Chief of Engineers, U. S. Army.

(Endorsed:) I certify that the award of the foregoing contract was made to the lowest responsible bidder for the best and most suitable articles and services on proposals received in response to advertisement hereto attached, which was published for thirty-three days by newspaper, and that further advertisement was impracticable.

W. H. HEUER,

Colonel, Corps of Engineers, Constructing Officer.

201 Advertisement U. S. Engineer's Office, Flood Building, San Francisco, Cal., April 6, 1904.

Sealed proposals will be received here until twelve o'clock May 7, 1904, for dredging in Petaluma Creek and Napa River, Cal.

Information on application.

W. H. HEUER,

Colonel Engineers.

Articles of agreement entered into June 21, 1904, between Colonel W. H. Heuer, Corps of Engineers, of the one part, and the North American Dredging Company, of the other part, for dredging in San Pablo Bay, Cal., at 14.48¢ per cubic yard.

Resolved, That R. A. Perry be, and he hereby is, made vice President and general manager of the North American Dredging Company, with full power to make any and all contracts for this company, and to sign as vice president or general manager any and all documents necessary in and about the business of this company.

I, W. A. H. Conner, assistant secretary of the North American Dredging Company, (does) do hereby certify and declare that the foregoing is a full, true, and correct extract copy of the proceedings of the meeting of the board of directors of the North American Dredging Company, held at the office of said corporation on the ninth day of November, 1903, and a full, true, and correct copy of the resolution adopted by said board of directors at said meeting.

Witness my hand and seal of said corporation.

[SEAL.]

W. A. H. CONNER,

Assistant Secretary North American Dredging Company.

202 Resolved, that the position of assistant secretary be created, and that W. H. A. Conner be elected to fill that position, his duties being to render such assistance as the secretary during the secretary's absence, disability, or refusal to act.

I, W. H. A. Conner, assistant secretary of the North American Dredging Company, do hereby certify and declare that the foregoing is a true, full, and correct extract copy of the proceedings of the meeting of the board of directors of the said North American Dredging Company held at the office of the company on March 31, 1904, and a full, true, and correct copy of the resolution adopted by said board of directors at said meeting, and I do further certify and declare that William Meade, secretary of said North American Dredging Company, is now absent from the State of California, where the office of the said company is located and its records kept.

Witness my hand and seal of said corporation.

[SEAL.]

W. A. H. CONNER,

Assistant Secretary of the North American Dredging Company.

At this point the witness was again temporarily withdrawn.

[Testimony of S. C. Hinds, for plaintiff.]

S. C. Hinds, called and sworn as a witness for plaintiff, testified as follows:

Direct examination:

I reside in Berkeley, and am manager of the Atlantic, Gulf and Pacific Company, and have been such manager for about four
203 years. The general business of that company is dredging, wharf work, bridge work, etc. It does all kinds of dredging in the execution of Government contracts, such as dredging channels.

I remember that in the month of May, 1904, my company had occasion to put in a bid for the doing of certain work in San Pablo Bay, to wit, the dredging of a channel about 300 feet in width and five miles in length. At that time I made an investigation with a view to determine what would be a fair rate for the performance of that work. I had before me the specifications which Colonel Heuer had in his office, and knew what the conditions of the proposed contract for the performance of that work would be. The proposal which my company put in for doing the work was executed as required by the specifications and was accompanied by the requisite guarantee.

Q. Under the terms of the proposal that you made for the performance of the work, and your investigation with a view to determine what would be a fair rate for the performance of that work, you took into consideration this provision in the specifications—"to deposit the spoil in water exceeding fifty feet in depth lying within an area bounded by lines drawn from The Sisters to Point San Pablo, then to Marin Islands, and thence back to The Sisters. The top of any pile shall not be higher than forty feet below the level of low tide." That was the provision in the specification for the deposit of spoil to which you directed your bid?

204 To which question the defendants severally objected upon the following ground: That it is irrelevant, immaterial, and incompetent, that the only breach of contract appearing in the contract is the failure to prosecute the work with due diligence, and on the further ground that the effect of the admission of this contract of the North American Dredging Company includes in effect a ruling by the court that the letting of that contract was a proper method to determine the damage that had accrued to the Government, and therefore any testimony now offered as to some bid put in by the Atlantic, Gulf & Pacific Company, and not specified, not involving any expenditure of money on the part of the Government, is irrelevant and immaterial and not within the issue. The court reserved its ruling upon the objection until the conclusion of the testimony and allowed the question to be provisionally answered, subject to the objection.

Mr. CLARK.—Q. You made no bid at that time directed to this particular provision in the specifications, that is, the provision for the deposit of the spoil between Lone Tree Point and Pinole Point? Your bid was directed to the specification to the effect that the spoil should be deposited in deep water, as I have mentioned?

Mr. LILIENTHAL.—It may be understood that the objection runs to all this line, so that I may not interrupt all the time.

The COURT.—Yes.

205 The Court reserved its ruling upon the objection until the conclusion of the testimony and allowed the question to be answered provisionally subject to the objection.

A. Yes, sir.

Mr. CLARK.—Q. What would you say at that time was a fair rate for the doing of that work, for the dredging of some 2,285,000 cubic yards in the channel in accordance with the specifications which you observed at that time? Would you say that the amount mentioned in your bid here was a fair rate, that is 14½ cents?

A. Yes, sir.

Mr. CLARK.—We desire to offer the bid put in by this company, the Atlantic Gulf & Pacific Company, for the purpose of showing that the rate at which the Government did do this work, 14—48/100 cents per cubic yard, is a fair rate, this witness having testified that 14½ cents per cubic yard is a fair rate.

The COURT. Let it be introduced.

The defendants severally objected to the introduction of said bid upon the ground that it was irrelevant, incompetent, and immaterial for the reasons stated in the last prior objection.

The court reserved its ruling on the objection until the conclusion of the evidence and allowed the bid to be received provisionally subject to the objection.

Said bid provisionally was received in evidence and marked Plaintiff's Exhibit "H." The work to be done under said bid was in all respects the same as the work to be done by the North American Dredging Company under its contract (Plaintiff's Exhibit "G"), said bid providing that the contractor should deposit the spoil in the place of deposit designated under letter "b" in the 36th paragraph of the specifications included in said North American Dredging Company contract.

Q. From the investigation made by you, from your experience as a contractor in the performance of this kind of work, would it cost less to do it in the way you did do it than to have deposited the spoil behind the line drawn between the extremities of the two points, Point Pinole and Lone Tree Point?

The defendants severally objected to this question upon the ground that it was irrelevant, incompetent, and immaterial for the reasons stated in the last prior objection.

The court reserved its ruling upon the objection until the conclusion of the testimony and allowed the question to be answered provisionally subject to the objection.

A. I believe it would.

Q. It would have cost less, in your judgment, to perform the work as you did perform it than it would to have placed the spoil behind the line drawn from Lone Tree Point to Pinole Point?

The defendants severally objected to this question upon the ground that it was irrelevant, incompetent, and immaterial for the reasons stated in the last prior objection.

The court reserved its ruling upon the objection until the conclusion of the testimony and allowed the question to be answered provisionally subject to the objection.

A. Yes, sir.

Q. In accordance with this requirement: "To deposit the spoil as near the south shore as practicable, within lines drawn between Point Pinole and Lone Tree Point, at such places as may be designated by the engineer officer in charge; and to impound the material behind bulkheads of suitable construction, subject to approval by the engineer officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract." You understand that provision?

The defendants severally objected to this question upon the ground that it was irrelevant, incompetent, and immaterial for the reasons stated in the last prior objection.

The court reserved its ruling upon the objection until the conclusion of the testimony and allowed the question to be answered provisionally subject to the objection.

A. Yes, sir.

WITNESS.—(Continuing.) I understood your question to relate to the offer of my company to perform the work covered by the specifications for the third reletting of the same. The Atlantic Gulf & Pacific Company did not actually perform the work.

208 [Testimony of William H. Heuer, for plaintiff (recalled).]

William H. Heuer, recalled for further direct examination.

The attorneys for the defendants here stated that no point was raised as to the method with which the contract with the North American Dredging Company was entered into, that is, touching the observance of the various provisions in the specifications in regard to the forwarding of the proposals, the giving of the requisite guarantee and similar procedure, and it was admitted by the attorneys for the defendants that a contract as shown by the specifications was entered into *which* the said North American Dredging Company, and that the work was performed in the manner set out in said contract; that the cubic yardage alleged in the complaint was removed in the manner alleged, that in the proportion that is alleged in the complaint to have been removed between the 30th and 31st foot plane was removed as specified, and that the sum of sixty-five thousand dollars (\$65,000.00) was paid by the Government in excess of the amount that would have been paid to the defendant *Rudolf Axman*, under his contract, and that Colonel Heuer in making the payments called for by the contract entered into by the United States with the North American Dredging Company complied with the terms and provisions of such contract.

209 WITNESS.—(Continuing.) The wrapper that was around the correspondence which referred to the annulment of the contract with *Rudolf Axman*, was received by me in due course of my correspondence with the chief engineer at Washington and as a letter.

The attorneys for the defendants admitted that the two notices of annulment, one addressed to the defendant *Rudolf Axman* and

the other addressed to the defendant American Bonding Company, were received after they were regularly deposited in the United States mail and in due course. I do not think there is any contention about that.

Mr. CLARK. I notice there is a slight omission in the evidence in regard to that. Do you admit that Mr. Lilienthal?

A. Yes, sir.

WITNESS (continuing). The large blueprint map you now hand me is a copy of the map which was in my office at the Flood Building at the time intending bidders were investigating with a view to putting in their bids prior to the time of the letting of the Axman contract. The copy that you handed me has been made since, but it is made from the same negative that the one hanging in my office at that time was made from. The original of this map was compiled in my office and forwarded to the office with my report, the report being mentioned in the specifications. These two long parallel lines which are drawn across the map about through the center of the same are the limits of the proposed cut.

The witness then indicated the position of Point Pinole and Lone Tree Point upon the map.

This map was thereupon offered and received in 210 evidence and marked Plaintiff's Exhibit "I," and made part of the record.

WITNESS (continuing). The map introduced in evidence yesterday is a copy of a map made by the Coast Survey which I believe is identical with the map that was in my office at the time the bids were made, or before that. This map, Exhibit "I," is an exact copy of the map that was on exhibition to intending bidders who were investigating with a view to entering into the contract. It was tacked on the wall in my office. When I advertised the bids in March, 1904, I received certain bids for the completion of the dredging of this channel. I have been an engineer upwards of forty years and am fairly familiar with the labor and all the necessary requirements that enter into the execution of a contract for the dredging of a channel of this character. There were two advertisements in the year 1904, one in March and one in May. The contract which was finally entered into was for fourteen and 48/100 cents (.14-48/100) per cubic yard for the dredging.

Q. What would you say is a fair rate for dredging in accordance with the contract entered into with the United States and the North American Dredging Company?

Mr. LILIENTHAL. The same objections to this testimony that were made to the testimony of Mr. Hinds.

The COURT. That contract was let?

Mr. CLARK. Yes.

211 The court reserved its ruling on the objection until the conclusion of the testimony and allowed the question to be answered provisionally subject to the objection.

A. I think the price paid was a reasonable price, fourteen and 48/100 cents (\$.14—48/100) per yard.

Q. Was that the lowest price at which any contractor offered to do that work for the Government in accordance with the provisions of that particular contract?

Mr. LILIENTHAL.—It is understood our objection runs to this.

The COURT.—Yes.

A. That was the lowest bid received.

WITNESS (continuing). In my opinion it would cost more for the Government to have proceeded with the dredging and to have done the dredging and deposited the spoil behind the line between Lone Tree Point and Pinole Point, as provided in the Axman contract, than it actually cost the Government to dredge and deposit the spoil where it was deposited under the contract between the United States and the North American Dredging Company. I would say that it would cost approximately or roughly about two cents (\$.02) more. During the letting of these contracts and during my endeavors to have this work completed, I received bids that indicated such divergence. There was one from Healey & Tibbitts. I know the capacity of the dredger "Caledonian" only by what she has done; her average capacity by the month, in seventeen months' consecutive work, is 75,000 yards plus. Mr. Axman did not have any dredger on this work other than the "Caledonian" at any time from the date he commenced work in February, 1903, *done* to the time of the annulment of the contract in December, 1903.

Cross-examination by Mr. AITKEN:

Mr. Axman built approximately 2,400 feet of bulkhead; consisting of two arms, one was 1,800 feet long and the other approximately 600 feet long. The short angle was about 600 feet in length. He did not, to my knowledge, subsequently add 600 feet, making it 3,000 feet in length. The length of the longer arm was about 1,800 feet. Then he made an offset to that about 600 feet in length. I testified that the bulkhead started from Point Pinole.

Q. Was it not a fact that the bulkhead was started from 800 to 1,000 feet behind the point?

A. Point Pinole is rather an indefinite expression. Point Pinole covers a good deal of territory, and if you said the extreme outer end of Point Pinole I would not say that it did not start at the extreme outer end, but very near the extreme outer end.

Q. The 36th paragraph of the specifications of the Axman contract states: "To deposit the spoil as near the south shore as practicable within lines drawn between Point Pinole and Lone Tree Point." Did you mean by that that the bulkheads were to start from some point inside of the end of Point Pinole?

A. No, sir. I meant from the outer end of Point Pinole to the outer end of Lone Tree Point.

213 WITNESS.—(Continuing.) I do not think it is a fact that the bulkheads built by Mr. Axman started from a point at

from 800 to 1,000 feet inshore from the extreme point of Point Pinole.

At this point, Mr. Clark, on behalf of the United States, handed witness a map, which was offered and received in evidence and marked Plaintiff's Exhibit "J," and made part of the record.

WITNESS.—(Continuing.) This is the channel (pointing to the map). There is the bulkhead. There is the line drawn between Point Pinole and Lone Tree Point, where the dumping was done in the first contract and also where the dumping was done in the second contract. The outlines of this map are furnished by the Coast Survey and we put in the red marks and blue marks. The pencil marks are from actual survey. The red lines were put in from our best judgment this morning. The photograph handed me looks to me like Point Pinole. I presume it is a photographic representation of the bulkhead referred to. That wharf of the Giant Powder Company has been built since that bulkhead was built. This bulkhead does not commence at a point of about 800 feet from the end of Point Pinole inshore.

At this point, photograph was offered and received in evidence and marked "Defendants' Exhibit No. 1" and made part of the record.

WITNESS.—(Continuing). I was the Engineer officer in charge of the work under the Axman contract and also under the contract let to the North American Dredging Company and as such was the
214 officer who designated the place where the bulkhead was to start and had general supervision of the work under both of the contracts. Mr. Axman was not allowed to deposit material elsewhere than behind the bulkhead. He commenced work on February 24th, 1903. At that time he had the dredger "Caledonian" and two self-dumping barges, but I do not know the capacity of the dumping barges. I do not know that their capacity was 1,000 yards each. I know very nearly about the yardage of the carrying capacity of these barges, but I was under the impression that they were less than 1,000 yards each. I was under the impression that they were about 800 yards. Mr. Axman also employed some steamboat in the work. That plant was approved by me before Axman commenced the work. I am of the impression that the "Caledonian" was removed from the work about the 23rd or 24th of June; about that time. I am not certain she was removed with my permission for repairs. The contractor said she was taken down to Oakland Creek about June 23d or June 24th, and I think she was, and it is my recollection that after the repairs were completed she was returned to the work October 1st. During a part of the time Mr. Axman also employed the dredger "Oakland" on the work, of which I approved. She was not on the cut. She was employed to dredge a channel into the place of deposit which I had designated and to dredge a sump there, in order that he,
Axman, might get his barges in behind the bulkhead, in addition
215 make room in that basin for dumping more material and distributing it over the basin. I think the contract specified

that he was not to distribute any material above low-water mark. I am not certain about that, but it was my intention, anyway, that he should not. I designated the place upon the line of the proposed channel where Mr. Axman should place the dredger "Caledonian" and the dredging should be done and limited him to that particular place, and the place that I placed Mr. Axman to do the work was below the line where the depths of water are shown on the map to be 25 feet and more, so that the amount of material that Mr. Axman could take out in the place where I placed him would be from 6 feet to nothing. I started Mr. Axman one mile east of the westerly end of the cut and made him work from the east towards the west one mile in length. Anything that Axman removed below the one foot, to the depth of one foot additional, that is making 31 feet, would be paid for by the Government at one-half rate under the contract, and anything below that not paid for at all. I started Mr. Axman at the four fathom line or 24 feet and made him work backwards southerly to where he could take out but one foot at full price and one foot at half price, and I confined him to that portion of the work. The original blue print that was in my office, which the bidders saw was burned in the fire. Exhibit "J" is an exact copy of it. The map I had in the office and which I described as tacked on the wall was not a white map, but a blue print, and Exhibit "J" was made from the same tracing that the one in the office was made from. Exhibit "J" is one of the maps referred to in the 40th paragraph of the Axman specifications that was on file in my office or an exact copy of one of the maps. There were other maps on file. Exhibit "J" showed the depths of water on the place of deposit and these depths were shown on two maps. If you draw a line from Point Pinole to Lone Tree Point (indicating them on the map) the area between that line and the shore is the area in which Axman was required to dump his material. I did not limit the contractor to a space on a line drawn northerly from what is represented on Exhibit "J" as Point Pinole for about 3,000 feet. He built his bulkhead for his own interest. He built as little bulkhead as would hold the material that he dredged. If he had carried out his contract he would have had to have built five or ten times as long a bulkhead as he did build.

Q. You designated the place, Colonel, where the bulkhead was to be built?

A. We mutually agreed—yes; I designated the place where the bulkhead was to be built.

The portion of the contract that Axman was working on was designated by me and at the same time I designated the place where Mr. Axman should deposit the spoil, the same being behind the bulkhead as it was built by him. I said that the capacity of the "Caledonian," as determined from 17 consecutive months' work, was 71,500 and a fraction—to be exact—71,590 yards monthly capacity; that is, she performed that amount of work that was paid for by the

217 Government in 17 months. I think that during the same period she probably excavated material below the 31st foot line, and that is not included in the measurement of 71,590 yards, because if she did that we kept no record of it.

The dredger "Caledonian" was a clam-shell dredger. I could not give you the dimensions, weight, or capacity of the bucket. It would probably lift from ten to fifteen tons at one time, and when allowed to sink into the earth it might go down six to ten feet, that would depend on the nature of the bottom, so that when the contractor was dredging where the deposit of material was but one foot thick; that is, the depth of water was 29 feet and the bucket sank six feet, then my measurements would show but the one foot for which the Government was paying in full and one foot for which the Government agreed to pay one-half and would not take into account the four feet below, so that when I say that the capacity of the "Caledonian" for 17 months was 71,590 yards monthly, it does not mean she could not excavate and take away more earth, but that that was the amount that I found had been removed above the place called for during the period of 17 months. I do not know that the "Caledonian" has a capacity of removing 190,000 cubic yards of material each month. I did not investigate that fact before I approved the plant at the commencement of the work. My recollection was in talking with Mr. McMillan I asked him the capacity of the "Caledonian" and he told me but I cannot recollect the

218 figures. I did not satisfy myself at that time that the "Caledonian" had a capacity for removing an excess of 100,000 cubic yards per month. That was an assertion made to me. I never satisfied myself of it and I approved of the dredge on such assertion.

Redirect examination by Mr. Clark.

In speaking of the capacity of the "Caledonian" and my estimate of the capacity I was basing my opinion in regard to what she actually performed when employed by the North American Dredging Company on the same contract. The location of the bulkhead was absolutely satisfactory to Mr. Axman, and no protest whatever was made at the time, neither was any protest whatever made as to the place of commencement of the work. I had a right to make him commence on the extreme left hand if I had so chosen because this was the rational commencement of the digging of the channel to be beneficial. Instead of that I gave him a chance to go a mile inland, where his digging was six feet deep.

The plaintiff offered a certified copy of the contract of the American Bonding Company, which we received in evidence and marked Plaintiff's Exhibit "K," and is in the words and figures following, to wit:

Plaintiff's Exhibit "K."

"Know all men by these presents, that we, *Rudolf Axman* of the city and county of San Francisco, State of California, as principal,

and American Bonding Company of Baltimore, a corporation
219 existing under the laws of Maryland, as surety, are held and
bound unto the United States of America in the penal sum of
fifty thousand dollars, to the payment of which sum, well and truly
to be made, we bind ourselves, our heirs, executors, administrators,
and successors, jointly and severally by these presents.

The condition of this obligation is such, that whereas the above-
bounded *Rudolf Axman*, has on the 21st day of November, 1902,
entered into a contract with the United States, represented by
Lient.-Col. W. H. Heuer, Corps of Engineers, United States of
America, for dredging in San Pablo Bay, California.

Now, therefore, if the above bounded *Rudolf Axman*, his heirs,
executors or administrators, shall and will in all respects duly and
fully observe and perform all and singular covenants, conditions,
and agreements in and by the said contract agreed and covenanted
by said *Rudolf Axman*, to be observed and performed, according
to the true intent and meaning of the said contract, and as well
during any period of extension of said contract that may be granted
on the part of the United States as during the original term of the
same, and shall promptly make full payment to all persons supply-
ing him labor or materials in the prosecution of the work provided
for in said contract, then this obligation shall be void and of no
effect, otherwise to remain in full force and virtue.

In witness whereof, the parties hereto have executed this instru-
ment, this 21st day of November, 1902, the name and corporate seal
of said surety being hereto affixed, and these presents duly
220 signed by its resident vice president, pursuant to the resolu-
tion of its executive committee passed on the 2d day of October,
1902, a copy of the record of which is on file in the War Department.

In presence of

G. KNIGHT WHITE as to *Rudolf Axman* (LEGAL SEAL).

Attest:

FRED B. LLOYD,

Resident Asst. Secretary, as to

AMERICAN BONDING COMPANY, BALTIMORE,

By BRONTE M. ATKINS, (LEGAL SEAL.)

Resident Vice President.

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

On the 21st day of November, in the year one thousand nine
hundred and two, before me, John Ralph Wilson, a notary public in
and for said City and County, residing therein, personally appeared
Bronte M. Atkins and Fred B. Lloyd, known to me to be the resident
Vice-President and resident Assistant Secretary of the corporation

described in and who executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[SEAL]

JOHN RALPH WILSON,
*Notary Public in and for the City and County of
San Francisco, State of California."*

[Testimony of William Healey, for plaintiff.]

Direct examination by Mr. Clark.

William Healey, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

I am a general contractor and have been such for twenty years. During that time have not had a great deal of dredging to do. Have only had two contracts. My firm has undertaken dredging contracts of various kinds. I remember about the month of May, 1904, that my firm had occasion to put in a proposal to perform certain work for the Government in San Pablo Bay.

Q. I will ask you if that is the proposal that you put in at that time in response to advertisements of the Government made by Colonel Heuer?

(Hanging witness proposal.)

A. Yes, sir.

Q. What would be a fair rate for performing the dredging required under this contract and depositing the material in deep water in accordance with provision "B" of Specification 36?

MR. LILIENTHAL.—To make the record plain, I will say the objection of the defendants is based on the ground that the court at most can admit testimony to show damage to the Government in the difference between prosecuting the work diligently and not prosecuting the work diligently up to the time of the rescission, and any testimony showing a difference between the contract price and market price is irrelevant. That is the ground of the objection.

MR. AITKEN.—The same objection will go to this line of testimony?

THE COURT.—Yes, sir. The rulings will be reserved until the conclusion of the testimony. The questions may be answered provisionally, subject to the objections.

A. I should consider about 15½ cents the highest bid at that time.

MR. CLARK.—Q. And for depositing the material in the manner provided by specification between Pinole Point and Lone Tree Point?

A. About 16½ cents.

No cross-examination.

[Testimony of R. A. Perry, for plaintiff.]

Direct examination by Mr. Clark.

R. A. Perry, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

I am a dredging contractor. Have been in that business about 18 or 20 years and am associated with the North American Dredging Company. In the month of May, 1904, I put in a bid on behalf of the North American Dredging Company for the performance of certain work called for by certain advertisements by Colonel W. H. Heuer, and at that time made an investigation with a view of determining a fair price for the work, and the bid of the
223 North American Dredging Company was finally accepted by the Government.

Q. In your judgment was the price you offered a fair price for the work, 14-48/100 cents?

Objected to by the defendants as incompetent, irrelevant and immaterial upon the ground stated in an objection to a similar question asked of the witness S. C. Hinds.

The court reserved its ruling on the objection until the conclusion of the testimony and allowed the question to be answered provisionally subject to the objection.

A. Yes, sir, that was my judgment at that time.

WITNESS.—(Continuing.) In my judgment the cost would have been greater to have deposited the same material between Lone Tree Point and Pinole Point, as provided for in the alternative clause of the specifications submitted. I think my estimate was that approximately the cost would be four cents per yard more.

No cross-examination.

[Testimony of M. C. Harris, for plaintiff.]

Direct examination by Mr. Clark.

M. C. Harris, a witness *call* on behalf of the plaintiff, being duly sworn, testified as follows:

I am president of the American Dredging Company. I put in a bid at the time of the Axman contract for the dredging of San Pablo Bay. That is the time that the first contract was let.
224 I understood at that time the requirements were that the spoil should be deposited between Lone Tree Point and Pinole Point. I understand generally the conditions under which the contract was finally performed. That it permitted the deposit of the soil that was dredged in deep water. It would have cost more to carry out the contract by depositing the spoil as required in the specifications between Pinole Point and Lone Tree Point than it would have cost to deposit it in deep water.

No cross-examination.

[Testimony of John Hackett, for plaintiff.]

Direct examination by Mr. Clark.

John Hackett, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

I am in the dredging business in this vicinity and have been for 27 years. I understand the character of the work that is to be done in the dredging of San Pablo channel and remember the letting of the contract for the dredging. I understood that under the first contract that the provision was that the spoil should be deposited in the manner set forth in the specification, between Lone Tree Point and Pinole Point, and under the contract as finally carried out the spoil should be deposited in deep water. In my judgment it would have cost more to carry out the contract by depositing the spoil between Lone Tree Point and Pinole on the flats in the manner specified than it would have cost to carry it out by depositing
225 it in deep water, and this cost would have been more when the contract was first let to Mr. Axman than it would afterwards.

No cross-examination.

The foregoing testimony of the witnesses M. C. Harris and John Hackett was all taken subject to the same objections as were made to the testimony of the witness S. C. Hinds, the rulings on these objections being reserved until the conclusion of the testimony.

[Testimony of H. L. Demerit, for plaintiff.]

Direct examination by Mr. Clark.

H. L. Demerit, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

I am a civil engineer and have been for about 36 years and am at present in the employ of the Government. I have had occasion under the direction of my office, within the last month, to make a map of San Pablo Bay in the vicinity where this work was to be performed and referred to by the witnesses. I made certain soundings there and the soundings which I made are those indicated on the map you show me between the extremities of Point Pinole and Lone Tree Point. The bulkhead as it was at the time of the commencement of the performance of the contract where the spoil was to be deposited is indicated on the map. The remainder of the writing on the map is self-explanatory. The map was taken from the Coast and Geodetic Survey.

226 It was here admitted that no portion of the money had been paid.

Cross-examination by Mr. Aitken.

The row of figures on this map marked plaintiff's Exhibit "L" indicates the soundings made by me—the soundings for mean low water. Where the figure 1 occurs, that means that at this point mean

low water is one foot in depth, and where the figure 2.3 occurs, that it is two and three-tenths feet in depth, and so on across that line. The white line represents high-water line. I took the marking of the high water or shore line from a chart of the Coast and Geodetic Survey which we received a short time ago from Washington. The word "bulkhead" over that line means the bulkhead built by Mr. Axman behind which to impound the material. That was taken from an actual survey of the land. It is not a fact that the bulkhead starts from a point 800 to 1,000 feet from the extreme point. I am as familiar with that locality as I am with any other place on earth. This photograph (Defendant's Exhibit 1) looks like a pictorial representation of Point Pinole. I should judge it to be a photograph of Pinole Point. It is not a fact with reference to Lone Tree Point that from the extreme point of Point Pinole to the place where the bulkhead was actually started there is a distance of approximately 1,000 feet. The point shown on that photograph shows the northwest point of Point Pinole. He could not start from the northwest point to
227 run towards Lone Tree Point, but with reference to Lone Tree Point, he started out from the outer end of Point Pinole to the northwest.

Redirect examination by Mr. Clark.

There was some filled behind this bulkhead at the time I made these soundings. Filled in from the deposits and dredging and I expect also from the deposits brought down by the water.

The plaintiff rests.

Motions for nonsuits.

Mr. AITKEN. At this time we move the court for a nonsuit on the ground that there has been a failure of proof on the part of the Government to show that the United States has expended any money whatever in completing the contract let to Rudolph Axman in excess of the price in the contract stipulated to be paid to him for completing the same, and also upon the ground that there has been a failure of proof to show that the work was done in the manner contracted for in the Axman contract, or that any part of the material taken from the channel was deposited within lines drawn between Pinole Point and Lone Tree Point at the places designated by the engineer officer in charge, or that any part of the material was impounded behind bulkheads, or that any bulkheads were built and maintained by the Government or at the expense of the contractor, the North American Dredging Company, and also upon the ground
228 that the contract states the measure of damages, which has not been shown, and that the evidence shows that there was a material change and departure from the terms of the contract let to defendant Rudolph Axman, by which the work was changed without his consent and without the consent of the defendant, American Bonding Company, and that such change releases the contractor and his sureties.

Mr. LILIENTHAL. I desire, if your honor pleases, to make a motion for a nonsuit on behalf of the defendant, the American Bonding Company of Baltimore, separately on all of the grounds already stated by Judge Aitken and on the following additional grounds:

First. That the only breach of contract made or proven by the plaintiff is the failure to proceed with due diligence in the performance of the contract, and that no evidence at all has been introduced by the plaintiff to show what the damage to the plaintiff has been because of the failure to prosecute the contract with due diligence.

Secondly. No evidence has been introduced to show that the contract with Axman, *annuled* by the Government, has been performed by anyone.

Thirdly. No evidence has been introduced to support the allegation of the complaint that the defendant Axman did fail to prosecute the work at all, nor in support of the allegation that the defendant Axman did refuse to complete or perform the contract, or that the defendant Axman did refuse to complete or perform any further part of the contract, or that the defendant Axman did abandon the contract, or that the defendant Axman did refuse

229 to do any work in the contract provided or any part thereof; and upon this additional ground, namely, that the fair construction of this agreement between the United States and Axman and the Surety Company is this: You shall proceed to perform your contract; if, in the opinion of the officer in charge, you are not prosecuting that part of the work called for by the contract with due diligence, that the Government shall have the right to take the contract out of your hands and have it performed for you—that is, for your account and benefit—and the moneys that the United States expends in having so completed your contract for your account is the amount that you shall pay to the United States Government to the extent that that represents any excess over the contract price.

Mr. AITKEN. I should like to add the same grounds made on behalf of the American Bonding Company to the grounds stated on behalf of the defendant Axman.

The court reserved its ruling on these motions for nonsuit until the conclusion of the testimony with the consent of the parties.

It is admitted that the Government paid \$65,000.00 more for the actual excavation by the North American Dredging Company under its contract with said last-mentioned company than it would have had to have paid under the Axman contract.

230 [Testimony of Rudolph Axman, for defendants.]

Direct examination by Mr. Aitken.

Rudolph Axman, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I am the Rudolph Axman who made the contract with the Government that has been introduced here as plaintiff's Exhibit "A." I

reside in San Francisco and know Colonel Heuer. He was the engineer officer in charge of the work in San Pablo Bay at the time I made my proposal and at the time the contract was accepted and let. Prior to the time that I made *by* bid or proposal to do the work I received from Colonel Heuer specifications of the work to be done. Correct copies of these specifications that I received are attached to plaintiff's Exhibit "A." Those specifications were to dig the channel that has been referred to in San Pablo Bay and deposit the spoil behind the bulkhead. In paragraph 10 of the specifications there is a statement that the part of the area available for the deposited material from scows has an average width of about three-fourths of a mile. Its distance from the site of dredging varies from one to two miles. The location of the place of deposit, the depth of water therein, and the location of the dredging are shown on maps on file in this office. I went to the office of Colonel Heuer

and was shown such a map by Mr. Knight, the chief clerk.
231 The map was tacked up on the wall and showed the depth of water and also the proposed channel to be dug. This blue-print map, plaintiff's Exhibit "I," may be a copy of the map that was tacked upon the wall in Colonel Heuer's office, but it does not indicate the figures down here that I saw in Colonel Heuer's office. It does not indicate the soundings and there was a map indicated to me which did indicate the soundings near Point Pinole. The depth the water indicated on the map to which I refer was nine feet, and there was a channel shown from where I expected to make the entrance behind the bulkheads. This point was about 1,500 to 2,000 feet from Pinole Point. This channel ran from shore to deep water about 1,500 feet from Point Pinole. The depth of water shown in this channel was from seven to nine feet. I relied upon and believed the representations made to me by that map to be true at the time I made my bid and proposal and was induced to bid upon and enter into the contract then because of the representations made to me as to the depth of water on this map. I proceeded to do the work under the contract. The bulkhead was ordered by Colonel Heuer to be from 800 to 1,000 feet further inshore from what I expected or what I based my bid upon. I protested at the time when the bulkhead was built to Mr. Demerit, his representative, and he simply said, "The colonel ordered me to put it here and there it goes." Defendants' Exhibit "1" is a photograph of the land represented at Point Pinole; figure "A" is Point Pinole. The long representation of piles is the bulkhead and is marked "B." The photograph, Ex-
232 hibit "1," was taken about a week ago, and I was present at the time it was taken. The point marked "C" on the photograph is the point where, under Colonel Heuer's direction, the bulkhead was ordered to be started from the land. I should judge approximately that the distance from the figure "A" on defendants' Exhibit "1," which is the point of the high land on Point Pinole, and the letter "C" on said exhibit, which is the point where I stated the bulkhead was ordered to start from by Colonel Heuer, would be

about 600 feet. I would state that approximately the distance from the point marked "D" on this exhibit, which is the low-water mark at Point Pinole, to the point marked "C," which is the point where Colonel Heuer ordered that the bulkhead should start, was between 800 and 1,000 feet. At the beginning the distance from the bulkhead at the point where it was actually started on the land to the place inland where I would float my scows and steamer, was not over 500 or 600 feet wide. If the bulkhead had been started on the point on this photograph (defendants' Exhibit 1) shown by the letter "A," which is at the point where the high land is at Point Pinole, the width of the place of deposit would have been approximately 1,500 feet. If the bulkhead had been started from the lower water point to the point marked "D" on this photograph (defendants' Exhibit 1) it would be 1,500 feet. If the bulkhead had been built out from the point on the letter "D" on the photograph (defendants' Exhibit 1), we would have had a width of 1,500 feet within which
233 to have dumped the material. The commencement and the building of this bulkhead from the point where it was actually commenced and built cut off the difference between 600 and 700 feet and 1,500 feet in the width of the dumping area. The point marked "E" on defendants' Exhibit 1 is about where the channel had a depth of from 7 to 9 feet. The dark portions of defendants' Exhibit 1, inside of the photographic representation of the bulkhead and the shore line represents mud flats; that is, land which is above the water. This line runs all the way almost from the letter "B" on said exhibit into the shore on a curved line. That was the land sticking out of the water at low tide last week and at the point marked "F" upon defendants' Exhibit 1; the land projected above low-water mark last week about a foot or a foot and a half. These same conditions prevailed as to the place of deposit along in November and December of the year in which Colonel Heuer *annuled* my contract. I did not, at the time Colonel Heuer designated the place at Point Pinole from which I was to build this bulkhead, express any satisfaction of such place, and Colonel Heuer never asked my approval thereof, and I did not approve of it. At the time it was selected I remonstrated to Mr. Demerit. Within sixty days from the date upon which Colonel Heuer notified me of the approval of the contract, I commenced the work of actually digging the channel and depositing the material. After the contract was awarded I
234 secured and assembled in San Pablo Bay, to be used in doing the work, the dredger "Caledonian" and two large dumping barges and an oil barge; that is, an auxiliary barge to carry the necessary fuel. I employed a pile driver to construct the bulkhead and employed the steamer "Sonoma," a stern-wheel steamer, to tow the spoil from the dredger behind the bulkhead. A statement of this plant, which I had assembled or was about to assemble, in San Pablo Bay was submitted to Colonel Heuer for approval before I commenced work. Colonel Heuer approved of the plant. The dredger "Caledonian" had a capacity of over 100,000 yards per

month. I dug as much as 112,000 yards in fourteen days with the dredger "Caledonian" up at Bouldin Island. The capacity of the barges to which I have referred was 800 yards, and the method of doing the work was to use a clam-shell dredger to pick up the material or spoil over in the channel and dump it into the hopper of the dumping barge, tow the barge in behind the bulkhead and dump the spoil and go back again to dredge. There was no other method by which the work could be done—the work that was required to be done under my contract with the Government. It could not be done in any other manner than with a clam-shell dredger, the lifting of the material from the bay, the putting it in barges and towing it in barges to the place of deposit by a steamer, and opening up the barges and letting it fall out. That is the only practical method in which that work could have been done. It was the only method, and was

conceded so by the best experts. Those barges when loaded
235 would draw about 8 feet of water. The barges were towed from the dredger into the place of deposit by the steamer "Sonoma"; they were towed in right on top of the land, and they often shoved them right in on the mud flats and they would show at low water. Opening the palls the barges would rise up so that it was only necessary to have sufficient water to tow the barges in there. After I had commenced work I actually ascertained that the depth of the water behind the bulkhead built under Colonel Heuer's direction was four feet at the deepest, and there was a very small area having that depth. After I commenced work I immediately proceeded to dredge and to dump behind the bulkheads. We had only continued a very short time when we had to wait for tides. We could only get in at high water, and which only occurs twice in 24 hours, and then we had to wait until the tide went out and came back again, and that retarded the work. At that time I made representations to Colonel Heuer as to the state of the water, and requested permission to deposit the material anywhere else then behind the bulkheads. I asked Colonel Heuer to give me permission to be allowed to dump either on the north side of the channel or to dump down at "The Sisters," where there were 150 feet of water, at the same price and under the same contract. "The Sisters" was at the place where the material was subsequently dumped under the contract with the North American Dredging Company. Before asking permission of Colonel

Heuer to change and modify the contract in the foregoing re-
236 spect I asked him for permission to let me dump the material outside of the bulkhead and employ an additional clam-shell dredger and lift it over the bulkhead. I also wanted to use a suction dredger and pick it up so that we could spread it over a great deal of territory. He said he would not permit it as it would bring it up too high. He only wanted to put in up to the low-water mark. I did employ the dredger "Oakland" to dig the channel into this place of deposit, and dig a sump or hole into the bulkhead where I could deposit this material. I decided to employ the dredger "Oakland" because Colonel Heuer would not allow me to place the material any

higher than it was, and it was as high as he would allow, and even objected to the height already. He said if I wanted to continue the dredger I had to move it further down and dig a new channel and a new sump, and keep on in that manner. The height of the material to which Colonel Heuer objected, in relation to the tide, was about a foot above low tide. Colonel Heuer would not allow me to use the dredger to spread the material only up to low-water mark, and therefore I had to discontinue the use of the dredger "Oakland" in making the sump. I don't remember the length of the dyke or bulkhead that I had built there, but it was between 3,200 and 3,500 feet. The effect of the bulkhead on the place of deposit, so far as it becoming shoal, was that the bulkhead acted as a barrier. It stopped the current and filled up very rapidly, not only with what we put in behind with the barges, but also the currents from the river
237 with the sediments. It filled from the outside as well as from the inside, so much so that the Giant Powder Company was obliged to extend the wharf further out, and it almost stopped the prosecution of my work. After the place filled up with silt and detritus that I have mentioned it was not possible to immediately float my barges and steamer in there so that I could unload them. It was after it became impossible to put my barges in there that I applied to Colonel Heuer for permission to drop the debris at "The Sisters." As near as I remember, it was in the latter part of October or early part of November, 1903, that I asked permission to dump at "The Sisters." I do not remember of making the request in writing, but Judge Aitken and myself went to Colonel Heuer for that permission.

WITNESS.—(Continuing.) Colonel Heuer said to me, "I will not allow you to dump any place else and if you do I will not pay you a cent for anything," and then Judge Aitken spoke up and he said, "Now, if you are not permitted you will be ruined or you will get broke," and Colonel Heuer drew himself up and he said, "I don't give a dam if I break Axman or not and I will break him." He said at that time to me that he intended to make me lose money on the contract and intended to ruin me. Prior to that time in the active pursuit of that work I had made a contract for additional barges in order to get in behind the bulkheads at low water. This contract was made with Mr. Kruze, a shipbuilder in Coos Bay. Each
238 one of these barges was of 1,000 tons capacity. I wanted these barges in order that I would have sufficient boats to go out in extreme high water to do the dumping and have the vessels left to reload while the tide was receding. One barge was to be delivered on July 10th and the other on July 20th. At the time I went to Colonel Heuer to get the permission to dump down at "The Sisters" one barge had been delivered and the other had not. The bulkhead that was built at the place designated by Colonel Heuer crossed the channel that I have referred to as containing 7 or 9 feet of water and it closed it up. I made the request of Colonel Heuer's assistant to be permitted to work on Sundays and holidays, and I made the plea that every other contractor was permitted to work on Sundays and

legal holidays, at any time they chose, although it was against the rules of the contract or specifications, but he would not give me such permission, even though I was behind in my contract. Colonel Heuer restricted me in the width of the channel that I was to excavate and limited me to a channel of 100 feet in width. He requested me to start on the 24-foot contour and work *and work* westerly to no feet. I asked the colonel to let me go the other way, as the contract provided for, that the channel should be dug 100 feet wide the full length of it, and explained to him that by so doing we would naturally get the high ones off the channel first, so that if any ship should or would come up there she would have a chance. He said,

239 "No, sir; I am the man to say where to dig; you go back." I told him I could not comply with the contract and get out 100,000 yards a month, because I had to dig twice or three times as much material and only got out one-third or one-fourth under the contract. When I say I would have to dig three times the material I mean on account of the clamshell dredger that we employed, which was a large one, and the bucket had a capacity of about 14 feet and itself weighed a trifle less than ten tons, when we lowered it down, naturally it would sink to its full depth in mud and would bring out material three and four and even six feet below the grade. I cannot recall the time of this conversation. I made this request not *one once*, but several times. Where the water was 29 feet in depth the bucket would dig out about four to six feet more than we were paid for. We could not regulate the amount of earth that would be dug out by the dredger, for the simple reason that the bucket was lowered down on the ground surface under the water and it dug it up by its own weight. The weight is the thing that forces it into the ground and does the digging. When we were working where there was 29 feet of water and but one foot of debris to be taken up, this bucket would go down five or six feet below the point called for in the contract. We would have to take this debris and the bucket away from that place in our barges and scows. We could not do any other way. I heard the testimony of Colonel Heuer that I removed under the contract a trifle less than 200,000 cubic yards of earth.

240 That is the amount that he measured up, or rather his assistants measured up, and would allow to be paid for, but we dug, excavated and carried away very much more than that. This excess was not measured, because it was taken from below the plane under the circumstances that I have described. Colonel Heuer knew that I had ordered two additional barges to be constructed for this work. I submitted the plans and specifications to his assistant and he suggested a few points in the way of constructing the work. He approved the general plan of the barges to be constructed. One of these barges was delivered on either the 31st of August or the first of September. When it arrived the machinery was not upon it, but as soon as it was placed upon it the barge was put to work. When we were working previous to June 23d in the channel, we found that the current was so strong, although this dredging machine had the

best fleeting device that was known at that time to the dredging science, that we would not fleet against the strong ebb tide or maintain the machine in position, so we decided to put another fleeting spud into the machine and asked permission of the Government officer in charge, and he said it would be a good idea to do so, that it would make speed to do it, so he granted permission, and we took the dredger down to Oakland to a shipyard and at great expense put a special fleet spud on her and as soon as the work was completed returned to the work, and it worked all right, and worked all the time and kept all the engines at work night and day; whenever the weather would permit working we did so, hence during the
241 period indicated by Colonel Heuer from June 23d to October 1st, my dredger was away having this fleeting spud put in by permission of the engineer officer in charge. The weather during the time that I was working upon this contract was exceptionally violent. We had more north wind than usual. Even Mr. Demerit and everyone that was up on the bay complained of it, that we had such long, windy spells that we were not able to tow the barges across; that the steamer could not handle them. It was about a mile and a half, I think, on an average, from the place where we were dredging to the place of deposit, and as the swell came from the westerly it would be in the trough of the sea and liable to upset one of those stern-wheelers, and the captains were afraid to go. They could not handle the barges at that time because of the force and violence of the elements. The force of the elements really lasted from March until June, until we went down to Oakland Creek, and we had fairly good weather in October, but in November and December it was very rough. After Colonel Heuer refused us permission to dump down at "The Sisters" we had all of the barges up there, and most of the time we only loaded them half full and tried to get in the shallow places as soon as we could and to dump at high water and get back at the ebb tide and load them while the tide was running out and coming back to its height again, so we only had a chance to dump at every high tide. As soon as the contract was awarded we assembled the plant, and as soon as everything was ready we
242 went to work. The bulkhead was constructed, although against my remonstrances. I didn't submit that it should be built there, but should go where the specifications called for, for I made my calculations that all of the material should go behind the bulkhead between the lines drawn between Point Pinole and Lone Tree Point, and no material should be deposited above low water, so we went up there at low water, at low tide, and we sized up the situation, and when Mr. Demerit came up there he looked at the bulkhead—why, he moved it in about 800 or 1,000 feet more than I really anticipated when I put the bid in. We fixed up, I think, about in the neighborhood of 500 or 600 feet of bulkhead and at the end of that was a steamer channel, whereby we could tow in at half tide to the dump, and we worked every time that the weather would permit us. We were at large expense, not only to get the stern-

wheeler and the stern-wheel boat to go into that shallow ground but we also had a propeller boat, that was able to live in the work outside, simply to bring the barge over to the stern-wheeler. We did everything that human skill and money could procure to make it success. After we kept on building on the bulkhead and we found that we could not make any better progress, we went to the expense of employing the dredger "Oakland" to make a channel and a sump whereby we would be able for a while to throw in the material and dump it in front of the suction machine and then pick it up again and throw it broadcast to low-water mark. A sump is

243 a basin in front of the machine whereby we could dump the loads in, the debris that was brought over from the channel. I rented the dredger "Oakland" at an expense of \$8,000 a month just to have a sump or place where I could deposit this material behind the bulkhead.

Q. Mr. Axman, in the contract made by you with the Government, in the 6th paragraph thereof, is the following clause:

"If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to the character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantity and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War."

I will ask you if at any time you assented in writing, as provided by this clause, to the change in the contract under which the work was done by the North American Dredging Company; did you assent in writing or otherwise that the place of deposit of material should be changed from between Pinole Point and Lone Tree Point, behind the bulkhead, to the place where it was subsequently deposited?

244 An objection to the foregoing question, made by plaintiff on the ground that it was incompetent, irrelevant, and immaterial and outside the issues, was sustained, defendant excepting.

WITNESS (continuing). I have not received a cent for the 200,000 cubic yards which I removed under the contract. It would not be possible for me or for anyone performing the contract, while working on the thin part—that is, where the water was 29 feet deep, and the dredger took out but one foot of material which the Government would pay for—to average 100,000 cubic yards per month.

Q. Would you, Mr. Axman, have made this contract or entered into the contract to do the work for the price that you bid, or for any price or sum whatever, if you had known that the bulkhead was to be placed from the shore 1,000 feet?

Mr. DEVLIN. I object to that on the ground that your honor allowed a question this morning that he would not have entered into the

contract on account of the representations. Anything they had a right to do under the contract he is not concerned with. He bid with regard to the terms of the contract, and this is entirely incompetent, irrelevant, and immaterial.

The COURT. The objection is sustained.

Mr. AITKEN. We do not claim that there is any actual fraud, but we think this: That if there was a misrepresentation, by which he was misled, it would be material, and while not actual fraud—and, of course, there is no actual fraud relied on here on the part of Col. Heuer, that there was misrepresentation, perhaps unintentional, and he was misled by that and induced to enter into this contract, and he would not have done so if he had known of that fact.

The COURT. He has been allowed to testify in regard to any representations made and the falsity of them.

WITNESS (continuing). I only know the amount of material that did dredge above the line called for in the contract measured in place and deposited behind the bulkhead from the amount given by the Government engineer. I think it was 190-odd thousand.

Cross-examination by Mr. Devlin:

I am a contractor and have been engaged in that business about 25 years and have had dredging contracts before, about four or five. I had a dredging contract before the Government and have had dredging contracts for other people. I have not dredged in the Bay of San Francisco, but have dredged in the Sacramento and San Joaquin Rivers. I have been engaged in the dredging business on and off for about twenty years. I did not own any dredgers at the time of making this contract. At the time this contract was made I had verbal contracts for dredgers with the Miners and also with the Fulton Iron Works; with the Miners for the "Caledonian." I did not get a dredger from the Fulton Iron Works. Before I made my bid I made an examination of the work. I went up there with a clam-shell dredger and dug in the channel to ascertain the kind of material to be dredged. I went up with Captain Eckart's clam-shell dredger. We dredged for one day. This examination was made about two or three weeks before the bids were opened. I had the specifications with me at that time and I examined the work and the dredging and the specifications. I found that the dredging, that is the digging, was all right. R. R. Streets, my partner, assisted me in making up my bid and Judge Aiken was my legal adviser. Mr. Streets is not an engineer. We both made the calculations and talked them over between ourselves and went to Judge Aiken for legal advice as to the meaning of the contract. I went over the contract and read it. I cannot say whether Judge Aiken read it or not. I gave it to him to read and he gave me advice on it. My partner did not go with me when I made the examination but I told him what I saw. After having obtained the advice of an attorney as to what the nature of the contract was and

reading over the contract, and after having talked with my partner and made my calculations, I put in my bid. I talked with Colonel Heuer about this matter before and after I made the examination. The first examination I made was upon the map. I cannot say whether I talked to Colonel Heuer personally before I made the examination of the ground, but I talked to his assistants. They showed me the map on the wall and what was to be done, the character of the work, and where the material would be deposited. I made the examination shortly thereafter for the purpose
247 of enabling me to make a bid and do the work. None of the officers of the United States accompanied me when I made the examination. I made it of my own free will and to my own satisfaction and examined everything I wanted to examine, and after I got through I felt satisfied to make a bid. I felt that I was in a position to make the bid and was in possession of all the information I needed.

Q. Did you have more than one conversation with Col. Heuer?

A. I don't remember how many I had.

Q. Can you remember one that you had?

A. It was in his office.

Q. I say do you remember that you had one conversation before you put in your bid? I am asking you now about the time before you put in your bid. Do you remember having one conversation with Col. Heuer? Or was it after you put in your bid?

A. I could not say.

Q. You are not sure?

A. No, sir.

Q. You will not tell this court and jury, will you, that you had a single conversation with Col. Heuer before you put in your bid? Or did you have? Whatever you say.

A. I could not say whether it was before or after that we discussed the matter with Col. Heuer. But before I put in the bid, I was fully informed by his representatives.

WITNESS (continuing). Before I put in my bid I had a conversation with Colonel Heuer's representatives, Mr. White
248 and Mr. Demerit in Colonel Heuer's office. Colonel Heuer was not present. I was shown the map, where the channel was to be dug, where the material was to be deposited and where the line was between Pinole Point and Lone Tree Point at low water. Before I began to work I made an examination of a part of the bay behind where the bulkhead was to be; made some soundings, quite a few in number; made them whenever the tide would permit; went all over the territory between the shore line and the bulkhead and made soundings to my entire satisfaction. I went over the space for the deposit of spoil many times before I began to work, and after I put in my bid. Captain Richardson was with me at the time, also Mr. McClure, a civil engineer. Both were employed by me. I don't remember the rest of the men with us. I had unlimited access to the place where the work was to be done. The officers did not pre-

vent me. We were satisfied that we could not carry out the digging and bring the material through that small channel which was represented to be 7 to 9 feet deep, and at that time I made the request right then and there to have the thing changed and have it modified, and Mr. Demerit said: "Oh, you go on; we'll get the thing through all right; you go on." I said: "This is a serious proposition; we want the thing righted." He said: "You go on, and we'll fix it some way." Then, also, at one time we made the proposition to Colonel Heuer to take the material and bring it down here and fill

in the Fair property and bring all of the material down here, and he said he would not think of it, he would not allow it.

I cannot tell the date on which the line of the bulkhead was fixed, whether it was before or after I got the work. I certainly must have known before I started to work. The bulkhead was the first thing we built. I don't know how long I built the bulkhead before I began digging—before I began the work. There was some discussion between Mr. Demerit and myself as to where the bulkhead line should be. I talked with Mr. Demerit about extending the bulkhead line to deeper water. I asked him to extend it in the place where it was to deep water. I remember of having had a conversation with Mr. Demerit. He wanted the bulkhead in one place and I wanted it changed, but it was not finally put where I wanted it. I asked him to put it where the contract called for. I wanted the bulkhead put at low water. It was not at my request that it was put out further than I intended to put it, but eventually before I began work I did put the bulkhead where the engineer directed. I was compelled to begin the work by the order of the colonel. I claim that I was induced to enter into this contract with the United States by fraud in the placing of the bulkhead. I made my propositions on the maps that were exhibited in Colonel Heuer's office in accordance with the specifications issued, which stated specifically and plainly that the material so excavated should be impounded behind bulkheads between Pinole Point and Lone Tree Point, a line drawn from low-water mark, or some words near that effect, to be deposited

up to low-water mark. By looking over the map that gave me quite an area in which to impound the material, and the figures were given on the map so I could see what depth that was and what material would tow in there, and when we went upon the ground to establish the bulkhead line it was entirely changed, and I asked Mr. Demerit—I said, "This is not according to the contract. It is not according to the interpretation and meaning of the contract that it should be built there, and if it is built there I certainly shall be up against it." Mr. Demerit says: "I don't care. Here are the instructions from Colonel Heuer and here goes the bulkhead, and it makes no difference." I begged him quite a number of times that it should go out to the low-water mark as exposed at low tide, but he would not listen to that. Then I said: "If the colonel insists upon that, I will certainly be up against it." He says: "We don't care. We want you to do that." I said: "I am going to do the very best

I can and I will use every facility possible to carry it out. If this is it I am up against it, but I shall do everything possible to get it done the best way I know how," and we didn't spare any expense and we employed the best skill that we possibly could to carry out the work, but whenever we made a point to go ahead with it something would turn up from the office to stop us.

Mr. DEVLIN. What I want to get at is this: What was said to you before you entered into this contract by anybody that you claim is not true? What was said to you before you made your bid by
251 anybody connected with the Government that is not true?

A. Why, Mr. Demerit said, "There is ample water to deposit the material behind those lines."

Q. What else?

A. That was all that was necessary.

Q. All right. Then all that was said prior to your making your bid by any officer of the United States Government was that there was ample water there to dump the material behind the bulkhead lines?

A. Yes, sir.

Q. You had seen the water yourself, had you not?

A. Yes, sir.

Q. You made the examination yourself, did you not?

A. Certainly.

Q. And you acted on your own judgment, did you not?

A. In building the bulkhead, I did not.

Q. Do you understand the question? I will ask the court to instruct you to answer the question. I asked what occurred prior to the making of the contract whereby you were defrauded. You now name one thing, that Mr. Demerit told you there was ample water behind the bulkhead lines. What I want to get at now is what occurred prior to the making of the contract. Do you understand it?

A. Yes, sir.

WITNESS (continuing). I had seen the water and made the examination myself, but I did not act on my own judgment in building the bulkhead. Before I made the bid I did not examine the depths
252 of the water behind the projected bulkhead line. I did so after I made the bid. I examined the digging before I made the bid and examined as much as I wanted to about digging the channel. The elements prevented me from making as much examination as I wished to. When I went out I made as thorough examination as I wanted to make, so far as the digging was concerned.

Q. What prevented you from making as much of the examination as you wanted to make?

A. I went on the truthfulness of the specifications and the maps.

WITNESS (continuing). I went out on a steamboat to make my examination and was engaged all day in making the same and completed my examination on that day as far as I wanted to go. I did not go out again. Nothing but the elements prevented me from going out again before I put in my bid. I could not find any suitable tides.

I believe I tried to go out again and was prevented by the elements. I could not say that the elements prevented me from going out for the whole thirty days. The only thing that prevented me from carrying out the contract of the Government was not finding sufficient water to dump the material in. Mr. White told me that there was sufficient water to dump the material in. Mr. Demerit also told me. Colonel Heuer was not here. They told me this at different times. Mr. White was the first gentleman I saw. I think some clerks were there, but they didn't listen to the conversation. Mr. Richards—I think
253 he was there. Mr. White did not say anything about 6 or 7 or 9 feet of water; he said he did not know how many feet there were. White gave me an indifferent answer. He said there was ample water there for the depositing of the spoil. That is why I also talked with Mr. Demerit. Mr. Demerit says: "There is the map; that shows it is from 7 to 9 feet of water." Mr. Demerit showed me the map, told me to examine it and I did examine it. I got the information from the map. The map was tacked on the wall. I believe I examined that map more than once, but I don't remember the number of times. There was only one map on the wall. I am sure that there was misrepresentation in the figures that the depth of the water within this enclosure was 7 to 9 feet, and that is the way the representation was made. The map shown me (plaintiff's Exhibit "I") is not a correct copy of the map that I saw there. It lacks the figures showing that channel. The channel that was designated upon the map ran up from here into this point here [pointing] into this creek to show the depth of the water and the figures were 7 to 9 feet, as I say. I saw that map shortly before the contract was taken away from me in 1903. I now tell the court and jury that, although Colonel Heuer testified that this is a full, true, and correct copy of that map, that this is incorrect, and that there were figures and a channel upon the map, not delineated upon this map or blueprint, and I saw it last four years ago. It may be a correct copy with the exception of
the channel and the figures, and to that extent it is a false map.
254 The greatest depth indicated on this map was 9 feet and the smallest two feet.

Q. In order to be exact, will you please tell me the figures that you saw upon that map that are not upon this map?

A. The figures indicating the channel and depth of water inside of the line between Point Pinole and Lone Tree Point.

Q. What were the figures?

A. The greatest were 9 feet.

Q. And what was the smallest?

A. Two feet.

Q. Two feet, you say?

A. Yes, sir.

Q. Two to 9 feet. Running, in what direction? From 2 to 9 feet, running in what direction?

A. It ran several directions, following the creek or channel.

WITNESS (continuing). I don't remember that after we started, we had any particular difficulty in carrying out this contract in connection with out propeller or tugboat. We used the stern-wheeler from the beginning; didn't use any propeller boat; the propeller would draw so much water we could not go inside the bulkhead. We did not try a propeller first. We took the propeller boat afterwards to assist the stern-wheeler. We found difficulty in carrying out our contract in the choppy condition of the sea or bay; that was why we employed a propeller boat to assist the stern-wheeler to carry the barges across the choppy sea or trough of the sea. That inter-
255 ferred with our work extensively. It delayed us so we could not do work continuously. As long as the wind lasted it prevented us, and this was an unusually windy season and was admitted by every sea-faring man that was up and down the channel to be so. It caused our stern-wheeler boat to lose power; the stern-wheeler would rise out of the water. The propeller would come out of the water and have no power to go ahead, and the boat was in danger of being upset. This perhaps retarded us one-third of the time. We afterwards got the suction dredger "Oakland" for making a channel and digging a sump. The character of this material that I took out was mostly soft, with the exception of one piece that we struck that was gravel. The material outside the channel was very good clam-shell work. Inside it was fairly good suction machine work, with the exception of the hard gravel and the rough weather that prevailed during May, so that the pontoons were upset repeatedly and caused a great deal of delay and the pipes were swamped and the men were afraid of their lives to stay by their work. Everybody says it is really a harbor and well protected, but it was so rough there that one season quite a number of men quit who were accustomed to this kind of work, because they would not work in that rough water. The material was about what I expected. The bulkhead prevented it from coming out into the bay. We had difficulty with the strong cross-currents of the bay.

The northwest wind as it comes in from the Golden Gate in
256 San Pablo Bay creates quite a swell, and we had to tow right across the bay and naturally would be in the trough of the sea, or on the top, and that made it very difficult to tow a barge across the swell. I figured I would get some of this when I put in the bid, but got more than I expected, and had more choppy sea than I expected, and that of course added to the cost of work and material. After we had one dredger and two barges, we bought two more barges. I made the statement to Colonel Heuer that I wanted to get another dredger, but he would not permit me to use it in the way I wanted to use it. I could have gotten one. I never complained to Colonel Heuer personally about this bulkhead, only to his representative, Mr. Demerit. This was at the time it was being constructed and afterwards.

The following letters were read in evidence, which letters, it was admitted, were written and forwarded by the persons whose names

are signed thereto to the parties to whom they appear to have been addressed and received in due course by the said parties to whom they were addressed:

"United States Engineer Office, 41 Flood Building, Third Floor.

SAN FRANCISCO, CAL., Sep. 18, 1903.

MR. RUDOLPH AXMAN,

Contractor for Dredging in San Pablo Bay, Cal.,

5 Market Street, San Francisco, Cal.

SIR: I have again to call your attention to your failure to comply with the terms of your contract in San Pablo Bay, Cal., one
257 of the most essential features of which is that you remove by dredging an average of at least 100,000 cubic yards of material and deposit same behind a bulkhead.

Your theoretical time for commencing dredging was March 4, 1903; you actually began on February 24, 1903. One June 22, 1903, you took your dredger 'Caledonian' away from the work to make some repairs or alterations to her. In the four months engaged on the work, when your aggregate output should have been 400,000 cubic yards, more or less, you removed in the entire times less than 100,000 cubic yards. At or about this time in June, the suction dredger 'Oakland' had been chartered by you, and you had prepared a basin within the impounding work so that you could reach the dumping ground with your scow had you so desired. On quitting work in June, you also knew the bulkhead of your impounding work was in bad condition, and you had a very small force at work making the repairs while your dredge 'Caledonia' was under repair. On July 1, you informed me by letter that your machine (meaning the 'Caledonia') would be ready again for operation in a few days; also that by the middle of July you expected two new dump barges in addition to your present plant, which would enable you to prosecute the work more vigorously.

You know that you did not send the dredger back to San Pablo Bay until July 31. From that day to the present time you have done no work whatever in the way of dredging from the channel, when
258 you should by this time have removed upwards of 600,000 cubic yards of material. You might also have been at work making necessary repairs to your bulkhead during the entire month of July. On August 21, you informed me that one of your new scows had arrived, and by letter of September 14 you inform me that this scow is not yet ready for work, and fail to state when the second dump-scow will arrive or is expected.

You have lost about three months of the most favorable weather on your work, when, so far as I know, there should have been no interruption at all. If you have any explanations to make concerning your failure to comply, either in letter or spirit, with the terms of your contract, you are requested to do so in writing, and also

inform me when you intend to resume work, in order that I may recommend to the War Department such action as is deemed necessary.

Very respectfully,

W. H. HEUER,
Lieut.-Col., Corps of Engineers."

OFFICE OF RUDOLF AXMAN, CONTRACTOR,
5 MARKET STREET,
San Francisco, Cal., Sept. 21st, 1903.

Lieut.-Col. W. H. HEUER,
Corps of Engineers, U. S. A.,
41 Flood Building, San Francisco.

SIR: I have the honor to acknowledge receipt of your favor of the 18th inst., with reference to progress made on the San Pablo Bay job. I fully appreciate the statements made therein, and
259 wish to assure you that it is my intention to do the work contemplated in the contract as expeditiously as possible and to do it well, to which end I am bending every effort by bringing into requisition everything that money and skill can accomplish in the way of proper appliances, having already assembled a plant cost \$175,000.00, as well as having constructed a bulkhead at the expense of over \$10,000, not including the cost of filling it in with dirt to give it permanency. But certain conditions have developed since operation was commenced which must be overcome.

While my theoretical time for commencing dredging was March 4th, 1903, by February 24th, 1903, I had succeeded in getting on the ground and in operation the largest and best adapted plant for this work that existed on this coast, consisting of the dredger 'Caledonia' (capable of digging an estimated output of 150,000 cubic yards per month) and two large center-dump barges of a capacity of 800 cubic yards each, together with the necessary accessory appliances. By this time there was in excess of 1,000 feet of bulkhead already constructed.

Owing to the shallowness of the water within the prescribed dumping ground, it was impossible to use a propeller tugboat of sufficient power to expeditiously tow the barges, hence I was compelled to use a shallow-draught stern-wheel boat; but notwithstanding this fact the water was so shallow that it was impossible to get
260 within the allotted dumping ground except within the comparatively short periods of high water.

The second difficulty was that the bay is so 'choppy' about one-half of the time, as a result of the heavy winds prevailing there, that a stern-wheel boat loses a great deal of her power, making it difficult to tow the barges against the tide.

The bulkhead was extended along the designated line, but this afforded no relief, for the reason that the depth of the water did not increase with the extension.

After operating about four months at a loss, as a result of the aforementioned drawbacks, I chartered, at considerable expense, the

large suction dredger 'Oakland,' for the purpose of creating a basin within the dumping ground, as well as a channel approaching thereto; but the dredged material was so soft that it refilled almost as rapidly as it was displaced. After operating a month with practically no beneficial results, the use of this machine was discontinued.

The third difficulty encountered was that, in addition to the strong currents running parallel with the channels the strong cross-currents and heavy winds prevailing in San Pablo Bay made it impossible to hold the ordinary type of dredger in the cut while fleeting. I therefore found it necessary to remove my dredger—the 'Caledonia'—to the shipyard in Oakland Creek for the purpose of installing an additional fleeting spud in order to hold her in place while the shift is being made.

261 The fourth difficulty was that aside from the plant I already possessed no additional equipment that could be used to an advantage on the work could be hired or purchased on this coast at any price; therefore it was necessary to create such additional appliances as were found necessary after actual operation had been commenced. I immediately contracted with a responsible party for the construction of two large center-dump barges, the first of which was to be delivered on July 10, 1903, and the second on July 20th, making time strictly the essence of the contract and exacting a heavy penalty for excess time consumed in making delivery. Owing to the length of the timbers required in the construction of the barges, the contractor found it impossible to get them finished on time, the first barge arriving in San Francisco Harbor on August 31st, 1903, while the second barge is still in course of construction. Likewise, the necessary irons, chains, etc., were ordered from the factory in the East, but owing to the crowded condition of the mills the first car did not arrive until the first part of the present month. Even then a serious mistake was made in the shipment, in that all the main chains were each four feet short. However, the remainder of the shipment is expected to arrive daily, when I will at once put on a large force to complete the first barge at the earliest possible moment. When completed, will be pleased to notify you that I am again ready to resume operations in the channel.

262 The repairing of the bulkhead, so far as the wooden structure is concerned, has been completed, and the dredger 'Caledonia' is now engaged in completing the filling in with earth to give the bulkhead permanency.

Considering all the circumstances existing in connection with this particular work (which were not discovered until after we had commenced operation, and prior to which time it was not known just what was required to best carry on the work), believe I am entitled to ask that you kindly recommend an extension of the theoretical time from March 4th to December 4th, 1903.

Very respectfully,

RUDOLF AXMAN, *Contractor.*"

WITNESS (continuing). The reason why I said nothing in my letter to Colonel Heuer about any misrepresentations made to me, or about this bulkhead line being changed at all, was that I had the wrath and animosity of Colonel Heuer on me anyway, and I did not want to antagonize him any further. I gave him the true reasons as far as I gave them, but omitted some. The true reasons I gave him were all right. I did not give him all that I perhaps should have given. The letter was dictated in my office. Mr. McAnany and myself wrote that letter. I dictated the major portion of it. I won't be sure whether I submitted it to Judge Aitken or not. The meaning of it is my dictation. It may have been constructed in better language than I am able to put it in. The substance of the letter is according to my dictation. Mr. McAnany helped me write the letter. I have consulted Judge Aitken in all particular matters connected with this transaction, but whether I submitted that particular letter to him or not I do not know. The bid which I signed in this case became a part of the contract, and I knew that it contained the following clauses:

"It is understood and agreed that the quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative in the same. Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies."

"All available information in the possession of the United States will be given upon application. The United States will not guarantee the correctness of its information and will not be responsible for the safety of the employees or materials used by the contractor, nor any damage done by or to them from any source or any cause. Bidders are expected to satisfy themselves as to the nature of the work to be done, and it will be assumed that proposals are based on a thorough understanding of its character. Intending bidders are urged to visit the localities of the work and by personal inspection and inquiry fully to inform themselves as to the present and probable future conditions. No allowance or concession will be made for any lack of information on the part of the contractor regarding the work. The price paid shall be full compensation for furnishing all necessary labor, materials, and appliances of every description, and for doing all the work herein specified to the satisfaction of the engineer officer in charge, and shall include all risks and delays of whatever nature attending the execution of the work."

After I had commenced the work I asked Colonel Heuer if he would permit me to bring the material down to the city and fill in the Fair estate property, and he said under no circumstances would

he allow it. I asked him to let me go down to "The Sisters" and dump, and he said he would not permit it until he was compelled by the higher authorities to do so. He did everything possible to make it a hardship on me. I asked him for three changes, none of which he granted. He would refuse any request I would make of any nature, it did not make any difference whether it was small or big. The following are the acts of Colonel Heuer, done by him after I entered into this contract, of which I now complain: He compelled me to dump behind the bulkhead that was not in the place that was contemplated or what the specifications called for. He made me work on a shallow place where it was impossible to get out the required yardage. It was more essential to dig the high places in the channel than the lowest. I asked him for permission to dig in the upper part, where there was more material to be dug, where
265 we could get out the average amount, and he denied it. I asked him for an extension of time of commencement. According to the interpretation of Colonel Heuer, the contract was impossible of performance. I wanted an extension of time to get an additional plant. I expected to make different provision, whereby it could be carried out. It could not be performed for the price and under the interpretation the way Colonel Heuer carried it to me. Colonel Heuer said my bid was too low and I could not afford to do the work at the amount bid. It could not be carried out at the price I bid by being restricted to the order of Colonel Heuer's interpretation.

Redirect examination by Mr. Aitken:

When I say it was impossible for the price I mean the way the colonel construed the language of the specification in the particular that the bulkhead be built considerably further in than the specifications called for. The barges could have, for a very short time, been floated and the material deposited in the place where Colonel Heuer directed the bulkheads to be built. The contract could not have been carried out by any person with the water that there was between those two points. It was not practicable to carry it out at any figure. I never asked Colonel Heuer for any extension of time, except as to the date of the commencement of the work. I also asked for permission to work Sundays and holidays. He also refused to allow
266 me to dump outside of the bulkhead and put it over by the aid of another dredger. I have seen something similar to plaintiff's Exhibit "C." It was not a map similar to that that I saw in Colonel Heuer's office at the time I speak of having talked to Mr. Demerit; it may have been there, but they never showed it to me. I was shown a map that had a channel on it and the depths different from the other map, and it was not this one. I never saw this map (plaintiff's Exhibit "C"). I bought the dredger "Caledonia" before I commenced work.

[Testimony of Wilbur F. McClure, for defendants.]

Wilbur F. McClure, a witness called on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. Aitken:

I am the city engineer of Berkeley and reside at Berkeley. I am a surveyor and know the defendant Axman and Colonel Heuer. I was superintendent for Mr. Axman when he was performing the work covered by the contract in question. I was on the dredger. His plant consisted of the clam-shell dredger "Caledonia," two barges at the beginning of the work, afterwards getting two additional larger barges, in connection with a barge for water and some smaller vessels—perhaps one or two—for oil transportation. He had a steamer.

Q. Was that plant capable of doing that work?

A. I cannot answer that directly yes or no. It was not capable of doing the work from the place of beginning back to a point marked zero and putting out 100,000 yards and placing it ashore or
267 behind the bulkhead. It was impossible for this dredge alone, or I believe, if it had been multiplied by three dredgers, to have placed behind the bulkhead at a time when barges could have been put in there, which was only at high time, and have removed that amount of material per month. Under the conditions, I mean that because of the lack of water the barges could only be floated in there at certain times and that it would require a number of dredgers to keep the barges busy to remove 100,000 yards per month. I was familiar at that time with the southwestern end of the place of deposit; that place was slightly affected by the tides, as far as the silt and detritus coming down the river was concerned. I don't think it was affected to any appreciable degree. The barges could not be floated in there except at high tide. I may have assented in Mr. Harris' office to the proposition that the place of deposit filled up by the silt and detritus by the tides, and for that reason it became impossible to do the work, but all of the shoaling that was done by the tides at this southern point would have no material effect upon the whole contract. There was a slight flowing, which would certainly interfere at some particular point, but in the aggregate I don't think it worth while considering. I was not with Mr. Axman at the beginning of the work, but upon my coming upon the work I think every effort was put forward that could be put forward to pursue the work with the plant
268 on hand. The storms and the violence of the elements repeatedly interfered with the work. On some days the wind blew so severely as not to permit work at all. At other times we could handle the dredger and load material, but could not get it through, and if we could get it through it might be at a time when the tide would not permit dumping it.

Cross-examination by Mr. Devlin:

Q. The sum and substance of your testimony is, Mr. McClure, that if Mr. Axman had had a sufficiently large plant he could do the

work according to the contract, but the plant he had was not sufficiently large to dredge the quantity required by the contract?

A. Yes, sir; that is right, as far as applies from the place he was to remove from 3 feet back to zero.

[Testimony of R. A. Perry, for defendants.]

R. A. Perry was called on behalf of the defendants, and testified as follows:

Direct examination by Mr. Aitken:

I am the manager of the North American Dredging Company, that eventually excavated the channel and deposited the débris down at "The Sisters." In doing that work we had and used the dredger "Caledonia"; it was employed on the work. I believe the "Caledonia" did excavate 100,000 yards some particular month while on the work at San Pablo Bay. I am not sure about it, however. The

Government record will show that. I understood the difference in the specifications of the two contracts. That under the

269 Axman contract the material was to be deposited behind bulkheads between Pinole Point and Lone Tree Point, and under the contract let my company it was to be deposited at "The Sisters" in not less than fifty feet of water.

WITNESS (continuing). I really had charge of the work when it was done by the North American Dredging Company.

[Testimony of M. C. Harris, for defendants.]

M. C. Harris, called as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. Aitken:

I have been engaged in the business of dredging about fifteen years, and was familiar with the plant employed by Mr. Axman in doing the work on what is known as the Axman contract for the dredging at San Pablo Bay. I knew the method employed by Mr. Axman in doing that work. I was a bidder for the work covered by the Axman contract, and obtained from the office of Colonel Heuer specifications for the work to be done before making my bid. By best recollection is that there was a map, a long map on the wall at the right as you went in in the reception-room, that had the proposed channel that was to be dredged marked on it, with the depth of water upon it in a general way. To the best of my recollection it contained figures showing the depth of water at the place of deposit. I would not be positive as to that, but I am quite sure the channel was marked out and also the depth there, the channel

270 that was to be dredged, not the channel that had been referred to by Mr. Axman, where there was from seven to nine feet of water. That was a small channel that ran right by Pinole Point. There was a channel extending quite a ways around, commencing up

at Lone Tree, and then around in through and came out at Point Pinole. That channel was not indicated on the map. I found that by sounding it myself.

Cross-examination by Mr. Devlin:

I could not say whether there were any figures for the bulkhead shown on the map which I saw. I have no recollection as to that. Neither have I any recollection as to any channel there. The channel that I am referring to is the one to be dredged. The channel which I sounded was not shown on the map at all. That was the channel that they wanted us to go into; to take the barges into. Before I put in my bid I made soundings in there in conjunction with Mr. Perry. I found it difficult to sound in a way; it was over a very large area, and involved a great deal of labor and great deal of expense to make those soundings. Before I put in my bid I wanted to go in there and look over the ground and verify it to a certain extent. I thought that was a proper thing to do. The channel delineated upon the map which I saw the channel to be dredged and not the channel which I found by sounding. I thought it was a proper business precaution to sound the area where the spoil was to be deposited, and did so. This was difficult and expensive. I know
271 nothing of any channel being shown upon the map where the spoil was to be deposited.

Here the defendants rested.

[Testimony of C. Knight White, for plaintiff (in rebuttal).]

C. Knight White, called in rebuttal for the plaintiffs, being sworn, testified as follows:

Direct examination by Mr. Clark:

Q. Mr. White, I will point your attention to Plaintiff's Exhibit "I," this large blue-print map, and ask you if that was a map that was upon the wall of the office in the Flood Building and to which Mr. Axman was referred; that is, whether this is a copy of that map.

A. That is a similar map.

WITNESS.—(Continuing.) The other was a blue print of the same map from the same tracing; that map had upon it the same writing regarding this work. In addition to what is shown on this map (Plaintiff's Exhibit "I") there was upon the map that was in the office a pencil line extending across from Point Pinole to Lone Tree Point indicating the line behind which the debris was to be put. That map was hanging on the wall in the office for about a month, and I saw it every day, and often two or three times a day. I saw it whenever contractors came in to get copies of the specifications.

When they came in I would talk to them and refer them to this
272 map. There was no channel indicated in the dumping ground, no figures to show the channel, the variation in depth. The only indication of the depth within the space between Lone Tree Point and Pinole Point were such as are marked on this map (Plain-

tiff's Exhibit "I"). The original of this map was prepared in our office. There was no channel indicated upon that map in the vicinity of Pinole Point. I am positive of that. I made no statement to Mr. Axman that would indicate that there was sufficient depth in the space behind the bulkhead to dump or not to dump. I did not know the amount of water that his dumping barges would draw. I could not draw a conclusion without knowing. I did not make any statement to him of any kind about the place being suitable for dumping or not. I made no statement to him that was false.

Cross-examination by Mr. Aitken:

Q. I will call your attention to the language of the 40th paragraph: "The location of the place of deposit, the depths of water therein, and the location of the dredging are shown on maps on file in this office." What maps?

A. The blue print similar to the one that has been exhibited, and also the Coast and Geodetic charts.

Q. And those maps did show the depths of water in the place of deposit?

A. No, sir. The Coast and Geodetic chart shows the depth of the water in the place of deposit.

Q. Then there were maps that showed that depth of water?

A. Yes, sir.

273

Redirect examination by Mr. Clark:

The Coast and Geodetic chart is the map shown me in my examination (plaintiff's Exhibit "C"). It is one of the Coast and Geodetic maps. There has been one published since, but I do not think that it was on file in the office at that time.

[Testimony of H. L. Demerit, for plaintiff (in rebuttal).]

H. L. Demerit, witness in rebuttal on behalf of plaintiff, testified as follows:

Direct examination by Mr. Clark:

I have seen a blue print in the office, but I could not swear positively that it was on the wall. It is usually put on the wall when the contract is let. The blue print which you show me (plaintiff's Exhibit "—") looks like a copy of the map that was in the office. I did not see upon this map any indication of a channel running into Pinole Point. When Mr. Axman was ready to build the bulkhead, I designated the point from which he should build it.

Q. Was any protest made at that time by Mr. Axman, and what was said?

A. Not exactly a protest, but a request that the bulkhead, the line of the bulkhead, be put out; not the beginning of the bulkhead, but the direction of the bulkhead, be changed so that it would extend out towards deeper water.

Q. Towards deeper water?

A. Yes, sir.

274 WITNESS (continuing). The exact line of the bulkhead line as constructed is shown upon the small blue-print map (plaintiff's Exhibit "L"). That map is carefully and accurately prepared. I should judge that the photographs (defendants' Exhibit "1") was taken from north of the point and north of the bulkhead, looking south, or very nearly south. The starting point of the bulkhead with reference to Lone Tree Point was the extremity of Pinole Point. The bulkhead was started from the outermost point of Point Pinole with reference to Lone Tree Point. I don't remember any particular statement that I made to Mr. Axman with reference to the depth of the water where he had to deposit the spoil, but I did not make any false statement to him with reference to such depth. I was never called upon by Mr. Axman for any information with reference to the depth of the water at Pinole Point, the place where the deposit of the spoil began, that he could not have taken from the map.

Cross-examination by Mr. Aitken:

Redirect examination by Mr. Clark:

The wharf shown on the photograph (defendants' Exhibit 1) has been built since the bulkhead was constructed, and the wharf shown on the chart there has been torn down and totally demolished; so it is two different wharves. I don't remember of having made a statement to Mr. Axman, "You go on; we are running this," or something of that kind.

275 [Testimony of O. R. Cannon, for plaintiff (in rebuttal).]

O. R. Cannon, called as a witness for the plaintiff in rebuttal, being duly sworn, testified as follows:

Direct examination by Mr. Clark:

I am at present in the civil engineer's office of Otto Von Geldern. I was in the employ of the Government in 1902, and at that time, as an engineer or draughtsman, had occasion to prepare a map exhibiting work to be done in San Pablo Channel. Plaintiff's Exhibit "I" is one of the blue prints from the tracing that I made under the direction of Colonel Heuer, from soundings taken from the United States Coast and Geodetic Survey. It is one of the copies. That is my momogram at the bottom there. A map exactly like that was upon the wall of Colonel Heuer's office, which bidders were invited to look at. I should remark that there was one difference only, the difference made by a red pencil, or rather, a red pencil used by Colonel Heuer after the map was on the wall I placed it on the wall, and Colonel Heuer, when the contractor came in, made a sketch or a slight line with a red pencil indicating about the location of the bulkhead line extending between the two points. I didn't see any indication of the channel at Pinole Point upon that blue print. There were no other figures except what you see there.

No cross-examination.

276 [Testimony of William H. Heuer, for plaintiff (recalled in rebuttal).]

William H. Heuer, recalled as a witness in rebuttal on behalf of plaintiff, testified as follows:

Direct examination by Mr. Clark:

I prevented the depositing of the spoil above the low-water mark for the following reasons. The tidal area of San Francisco Bay covers about 480 square miles. The volume of tide between high water and low water, or tidal prism, is what maintains the depth of water in our bar of San Francisco; therefore, the Government does not let anybody put anything above low-water mark. I never at any time prohibited Mr. Axman from obtaining a dredge in addition to the dredge that he had, in order to do the dredging of this channel, and never at any time said he had the best machine and outfit that could be procured for the doing of this work. In requiring Mr. Axman to dredge in the channel in a manner which I did, I did not in any manner depart from the terms of the contract. His contract required him to excavate a channel 27,000 feet long, 300 feet at the bottom, and to a depth of 30 feet. The natural place to commence and dig that channel for the purpose of commerce was on the end nearest San Francisco, working towards Mare Island. Instead of making him commence on that end, which has no depth, or zero
277 depth, I let him go up one mile in the channel where they had six feet of depth of digging, and could work down through there towards the west end. I did this because commerce had to go through the lower end to get to the upper end. I think Mr. Axman came to me once and said he would like to put another dredge—would like to dump material outside the bulkhead; that is, on the channel side of the bulkhead, and then lift it over from there back into the impounding ground. I said, "You can't do it, for the reason that the current will carry the material which you put outside the bulkhead away, and it will not be impounded, and therefore you are not permitted to do it." I don't know whether I gave him this reason or not, but that is the reason I didn't allow him to dump outside the bulkhead. Mr. Axman used the "Oakland" just about twenty days. I presume he abandoned her; he stopped using her; I never in my life had any conversation with Mr. Axman in which I stated I was going to ruin him. By supplying a proper equipment and a proper plant it was unquestionably possible to perform this contract and to deposit the spoil behind the bulkhead line. The defendant in this case did not undertake to extend his bulkhead line after he had constructed it to this particular point, shown by the evidence. I in no way prevented him from extending his bulkhead line along towards Lone Tree Point. If he had extended the bulkhead line towards Lone Tree Point it would of course have increased the area for the deposit of spoil, and it would have cost more money, and that is
278 the reason he did not build it. Of course it could have been done with the expenditure of money. Probably twelve hours out of the twenty-four the water was of sufficient depth, in my judg-

ment, to have gotten into the place of deposit with barges suitable for doing work under the terms and conditions of this contract. This is taking into consideration the coming in and outgoing of the tide. The first steamboat that Mr. Axman procured for the purpose of pulling scows was an ordinary stern-wheel boat, capable of doing a little towing and carrying passengers. Nobody would employ a steamboat of such light draught to tow barges and expect them to do good work. In other words, they would not expect a steamboat drawing about three or four feet to pull barges drawing eight or nine feet, and do at all economical work. The first scows Mr. Axman employed about this work were old and drawing about eight feet of water. The tug drew more water than the scows. Of course a tug could not go in the shallow water behind this bulkhead. He employed the steamboat first and finally the tug, which, as I say, drew more water than the scows.

Q. Colonel Heuer, did you in revoking this contract have any animosity or ill-will towards the defendant?

A. I will say I was not friendly to him, but as to animosity, no.

WITNESS (continuing). The only reason in the world why I revoked this contract was because I thought he was not complying with the contract faithfully and diligently, and had, between
279 the time of the commencement of the work and the time that I did annul the contract, actually excavated only about one-fifth of the amount required in the contract.

Cross-examination by Mr. Aitken.

Q. Colonel Heuer, you say you did not have any animosity against Mr. Axman?

A. I didn't say that. I said I was not friendly with Mr. Axman.

Q. You said also, with a great deal of force, that you never said you intended to ruin him.

A. I say that emphatically.

Q. I will ask you if you testified in a certain action entitled *Rudolf Axman against the United States*, pending in the Court of Claims at 876 Eddy Street in this city, on the 9th day of July, 1906, in the presence of Benjamin Carter, Esq., and T. N. Ashworth, Esq., both gentlemen from Washington, and of *Rudolf Axman* and John R. Aiken, as follows:

"Q. You have a good deal of feeling against Mr. Axman, have you not?

"A. I had some feeling.

"Q. You have yet?

"A. Yes, sir; I have some.

"Q. And you have not hesitated to express that feeling on any and every occasion, have you?

"A. I have always expressed it whenever it was necessary or essential.

"Q. And you have expressed that feeling both in his presence and in the presence of other persons, have you not, in relation to this work, have you not?

280 "A. I have."

You gave those answers to those questions, did you not?

A. I did.

Q. And you also gave this answer to this question:

"Q. Do you remember an occasion in the Flood Building when, in the presence of Mr. Axman and myself, I called upon you in relation to Mr. Axman's claim for one-half of the sum due on Arch Rock, claiming he was entitled to that sum, to one-half of the contract price on that rock, because he had exploded it by tunnel process, and I told you Mr. Axman needed it for further prosecution of the work, and that the delay would ruin him, and you said you didn't give a damn, that you intended to ruin him."

Q. Did you give this answer to that question:

"I don't recollect that I said I intended to ruin him. I may have said I didn't give a damn whether it did ruin him."

A. That is exactly what I said.

Q. Did you, in answer to that, say this: "Will you say that you did not say that you intended to ruin him?"

A. I will not say that I did not say that, but I don't believe I said any such thing as that." That was your answer last July when the deposition was taken, was it not, Colonel Heuer?

Redirect examination by Mr. Clark.

281 That was entirely another case than this one, in which I had a whole lot of trouble with Mr. Axman in reference to his blowing up of some rock in this harbor; it had no concern whatever with this action, and did not influence my judgment a particle in this particular case. The testimony was given about three years after this contract had been revoked. The Shag Rock contract was completed long before this contract was entered into.

Plaintiff offered in evidence a certain map referred to by Colonel Heuer in his testimony, which was received and marked Plaintiff's Exhibit "M," and made a part of the record.

The foregoing contains a full and true statement of all of the evidence received or provisionally received or offered in the above-entitled cause. The parties announced they had no further evidence to offer.

At the conclusion of the foregoing testimony the matter of ruling upon the objections to questions and the introduction of evidence, which objections were made by the defendants, and the matter of ruling upon the motions for nonsuit interposed by the defendants came up for consideration. Whereupon the defendants, and each of them, interposed a motion that the court instruct the jury to return a verdict in favor of the defendants and each of them.

The court stated that in making its rulings it should be guided entirely by the law as laid down by the Circuit Court of Appeals in passing upon the case when it was taken before that court by the defendants upon writs of error after the previous trial and judgment in the case.

282 The court stated that objections had been made to certain questions which the court had allowed to be answered; that the evidence was allowed only provisionally upon the understanding that the court would rule finally upon the objections and the evidence thereby adduced at the conclusion of all the testimony. The court stated that it now sustained all the objections made to the questions the rulings upon which were reserved, and that it ruled out all the answers and testimony brought out by said questions.

The plaintiff noted and the court allowed it an exception to each of the court's ruling so made in favor of the defendants upon their said objections and to each of the court's rulings in so excluding the answers and the testimony brought out by such questions.

Certain documentary evidence was also offered in evidence by the plaintiff, and the introduction of the same was objected to by the defendants and each of them. The court stated that this evidence had been only provisionally allowed, the ruling upon the same being reserved as in the case of the court's rulings upon objections made to questions, until the conclusion of the testimony. The court thereupon sustained all of the objections made to the introduction of this evidence and ruled the same out. The plaintiff noted and the court allowed it an exception to each of the court's rulings in sustaining the objections last referred to and excluding the evidence last mentioned.

283 The plaintiff objected to the granting of the motion made by the defendants and each of them that the court should instruct the jury to find in favor of the defendants, and the plaintiff duly noted and the court allowed its exception to the court's instruction to the jury that it should find in favor of the defendants.

The instruction of the court to the jury was as follows:

"Gentlemen of the jury: Under the opinion of the Circuit Court of Appeals made in this cause, it becomes the duty of the court to instruct you to find a verdict in favor of the defendants in this cause, and you will do so accordingly."

Thereupon following the giving of this instruction the cause was duly submitted to the jury for its decision, and it thereupon found and returned to the court its verdict, as follows:

"United States Circuit Court for the Northern District of California.

THE UNITED STATES OF AMERICA

vs.

RUDOLPH AXMAN ET AL.

No. 13,914.

Verdict [in bill of exceptions].

We, the jury, find in favor of the defendants.

J. M. LONG, *Foreman*.

[Endorsed]: "United States *vs.* Rudolf Axman et al. Verdict. Filed December 13, 1910. Southard Hoffman, clerk. By W. B. Maling, deputy clerk."

284 The plaintiff duly excepted to the verdict of the jury so rendered.

Whereupon the clerk of the court entered judgment that plaintiff take nothing and in favor of defendants and each of them and against the plaintiff. Said judgment was so entered on December 13th, 1910.

Stipulation relative to exhibits.

It is hereby stipulated and agreed by and between the attorneys for the respective parties to the above and foregoing action that all exhibits introduced upon the trial of this action, and now in the custody of the clerk of this court, shall be deemed to be included as a part of the foregoing bill of exceptions, with the same effect in all respects as if incorporated in said bill of exceptions.

JESSE W. LILIENTHAL,

*Attorney for the Defendant American
Bonding Company of Baltimore.*

AITKEN & AITKEN,

Attorneys for the Defendant Rudolf Axman.

ROBT. T. DEVLIN,

Attorney for the Plaintiff.

Order approving, etc., bill of exceptions.

The foregoing bill of exceptions, duly proposed and agreed upon by the counsel of the respective parties, is correct in all respects and is hereby approved, allowed, and settled and made a part of the record herein.

Dated this 19th day of January, 1911.

WM. C. VAN FLEET,

Judge.

285 Stipulation relative to bill of exceptions.

It is hereby stipulated and agreed by and between the attorneys for the respective parties to the above and foregoing entitled action that the foregoing bill of exceptions has been presented in time, and that it be approved, allowed, and settled by the judge of the above-entitled court, and that the same shall be made a part of the record in said action and be a bill of exceptions therein.

Dated *January, 1911.*

ROBT. T. DEVLIN,

Attorney for Plaintiff.

JESSE W. LILIENTHAL,

*Attorney for the Defendant American Bonding
Company of Baltimore.*

AITKEN & AITKEN,

Attorneys for the Defendant Rudolf Axman.

[Endorsed:] Filed Jan. 21, 1911. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

UNITED STATES OF AMERICA, PLAINTIFF,	}
<i>vs.</i>	
RUDOLF AXMAN AND AMERICAN BONDING COMPANY of Baltimore (a corporation), defendants.	

286

Petition for writ of error, etc.

Now comes the plaintiff, the United States of America, herein and says that on the 13th day of December, 1910, judgment was entered herein in favor of defendants and against this plaintiff, that the plaintiff take nothing, and that the defendants go hereof without day; and that in the said judgment and in the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will appear in detail from the assignment of errors herein.

Wherefore said plaintiff prays that a writ of error shall issue in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that the transcript of the records and the papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals, and that all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

And your petitioner will ever pray.

Dated January 21, 1911.

ROBT. T. DEVLIN,
United States Attorney.

[Endorsed:] Filed Jan. 21, 1911. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

287 *In the Circuit Court of the United States, Ninth Circuit, Northern District of California.*

UNITED STATES OF AMERICA, PLAINTIFF,	}
<i>vs.</i>	
RUDOLF AXMAN AND AMERICAN BONDING COMPANY OF BALTIMORE (a corporation), defendants.	

Assignment of errors.

The plaintiff, the United States of America, in this action, in connection with its petition for a writ of error herein, makes the following assignment of errors, which it avers occurred, to wit:

I.

The court erred in sustaining the objection interposed by the defendants to the offer in evidence of the contract between the North

American Dredging Company and the United States of America, under which it is claimed by the plaintiff the work to be done was completed, the said objection following immediately after the following offer:

"Mr. CLARK. We offer the contract between the United States of America, executed through Colonel W. H. Heuer acting on behalf of the Government, and the North American Dredging Company."

And the objection to such offer being:

"To which the defendants then and there severally objected
288 upon the ground that it is incompetent, irrelevant, and immaterial, not within the issues of the pleadings, and that the issue of the pleadings is that after the annulment of the contract the work was readvertised, and on June 21st a contract was made with the North American Dredging Company of San Francisco to do the work left undone by the defendants herein; that the contract shown to have been made with the defendant Axman was to dig a channel 27,000 feet in length, 300 feet wide and 30 feet deep, and deposit the spoil at a particular place to be designated by the engineer in charge between Pinole Point and Lone Tree Point, behind bulkheads to be built by him. The allegation of the complaint is—they readvertised and let the work to be done. The contract now offered in evidence shows that the work let in the contract offered was to dig a channel 27,000 feet in length, and to deposit the spoil at a certain place called 'The Sisters,' in depth of water exceeding 50 feet deep.

Furthermore, according to Plaintiff's Exhibit 'A,' it provided that if there was any change whatever in such contract, it should be agreed upon by the contracting parties, sanctioned by the chief engineer, and put in writing and there is no evidence here that the changes contained in the document now offered were agreed upon by the contracting parties, sanctioned by the chief engineer, and put in writing."

The court reserved its ruling on the objection until the conclusion of the testimony, and allowed the contract to be received provisionally subject to the objection.

289 (The court finally sustained the objection and struck out the contract which said ruling so finally made is assigned as error, as is the ruling of the court striking out the contract.)

II.

The court erred in sustaining the objections made by the defendants to the questions put by the plaintiff to the witness S. C. Hinds, and in excluding the answers of such witness the questions, objections, and answers being contained in the following portion of the record:

"Q. Under the terms of the proposal that you made for the performance of the work, and your investigation with a view to determine what would be a fair rate for the performance of that work, you took into consideration this provision in the specifications—to deposit the spoil in water exceeding fifty feet in depth lying within an area bounded by lines drawn from The Sisters to Point San Pablo,

then to Marin Islands, and thence back to The Sisters. The top of any pile shall not be higher than forty feet below the level of low tide.' That was the provision in the specification for the deposit of spoil to which you directed your bid?

"To which question the defendants severally objected upon the following ground: That it is irrelevant, immaterial, and incompetent, that the only breach of contract appearing in the contract is the failure to prosecute the work with due diligence, and on the further ground that the effect of the admission of this contract of the North American Dredging Company includes in effect a ruling by the court that the letting of that contract was a proper method to determine the damage that had accrued to the Government, and therefore any testimony now offered as to some bid put in by the Atlantic Gulf & Pacific Company, and not specified, not involving any expenditure of money on the part of the Government, is irrelevant and immaterial and not within the issue.

The court reserved its ruling upon the objection until the conclusion of the testimony and allowed the question to be provisionally answered, subject to the objection."

(The court finally sustained the objection and struck out the answers, which said rulings are each assigned as error.)

"Yes, sir.

"Mr. CLARK.—Q. You made no bid at that time directed to this particular provision in the specifications; that is, the provision for the deposit of the spoil between Lone Tree Point and Pinole Point? Your bid was directed to the specification to the effect that the spoil should be deposited in deep water, as I have mentioned?

"Mr. LILIENTHAL.—It may be understood that the objection runs to all this line, so that I may not interrupt all the time.

"The COURT.—Yes.

"The court reserved its ruling upon the objection until the conclusion of the testimony and allowed the question to be answered provisionally subject to the objection."

(The court finally sustained the objection and struck out the answers, each of which ruling is assigned as error.)

"A. Yes, sir.

"Mr. CLARK.—Q. What would you say at that time was a fair rate for the doing of that work, for the dredging of some 2,285,000 cubic yards in the channel in accordance with the specifications which you observed at that time? Would you say that the amount mentioned in your bid here was a fair rate; that is, 14½ cents?

"A. Yes, sir."

III.

The court erred in excluding the bid of the Atlantic Gulf & Pacific Company and in sustaining the objection of the defendants thereto, the offer of the said bid and the objection of the defendant thereto being shown in the following from the record herein:

"Mr. CLARK. We desire to offer the bid put in by this company, the Atlantic Gulf & Pacific Company, for the purpose of showing that

the rate at which the Government did do this work, 14 48/100 cents per cubic yard, is a fair rate, this witness having testified that 14½ cents per cubic yard is a fair rate.

"The Court. Let it be introduced.

"The defendants severally objected to the introduction of the said bid upon the ground that it was irrelevant, incompetent, and immaterial for the reasons stated in the prior objection.

"The court reserved its ruling on the objection until the conclusion of the evidence and allowed the bid to be received provisionally subject to the objection."

(The court finally sustained the objection and struck out the bid, each of which said rulings is assigned as error.)

"Said bid was received in evidence and marked Plaintiff's Exhibit 'H.' The work to be done under said bid was in all respects the same as the work to be done by the North American Dredging Company under its contract (Plaintiff's Exhibit 'G'), said bid providing that the contractor should deposit spoil in the place of deposit designated under the letter 'b' in the 26th paragraph of the specifications included in said North American Dredging Company contract."

IV.

The court erred in sustaining the objection made by the defendants to the question put to the witness Hinds, and in excluding the answer of the said witness, which said question and objection and answer are shown in the following portion of the record in this cause:

"Q. From the investigation made by you, from your experience as a contractor in the performance of this kind of work, would it cost less to do it in the way you did do it than to have deposited the spoil behind the line drawn between the extremities of the two points, Point Pinole and Lone Tree Point?

"The defendants severally objected to this question upon the ground that it was irrelevant, incompetent, and immaterial for the reasons stated in the last objection.

"The Court reserved its ruling upon the objection until the conclusion of the testimony and allowed the question to be answered provisionally subject to the objection."

(The Court finally sustained the objection and struck out the answers, each of which said rulings is assigned as error.)

"A. I believe it would."

V.

The court erred in sustaining the objection of the defendants to the question asked the witness S. C. Hinds and in excluding the answer of the witness made to such question, which said question, objection, and answer are shown in the following from the record in this case:

"Q. It would have cost less, in your judgment, to perform the work as you did perform it than it would to have placed the spoil behind the line drawn from Lone Tree Point to Pinole Point?

"The defendants severally objected to this question upon the ground that it was irrelevant, incompetent, and immaterial for the reasons stated in the last objection.

"The court reserved its ruling upon the objection until the conclusion of the testimony and allowed the question to be answered provisionally subject to the objection."

294 (The court finally sustained the objection and struck out the answer, each of which said rulings is assigned as error.)

"Yes, sir."

VI.

The court erred in sustaining the objection of the defendants to the questions asked the witness S. C. Hinds and in excluding the answer of the witness made to such question, which said question, objection, and answer are shown in the following from the record in this case:

"Q. In accordance with this requirement: 'To deposit the spoil as near the south shore as practicable, within lines drawn between Point Pinole and Lone Tree Point, at such places as may be designated by the engineer officer in charge, and to impound the material behind bulkheads of suitable construction, subject to approval by the engineer officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract.' You understand that provision?"

"The defendants severally objected to this question upon the ground that it was irrelevant, incompetent, and immaterial for the reasons stated in the last objection.

"The court reserved its ruling upon the objection until the conclusion of the testimony and allowed the question to be answered provisionally subject to the objection.

295 (The court finally sustained the objection and struck out the answer, each of which said rulings is assigned as error.)

"A. Yes, sir.

"WITNESS (continuing). I understood your question to relate to the offer of my company to perform the work covered by the specifications for the third reletting of the same. The Atlantic Gulf & Pacific Company did not actually perform the work."

VII.

The court erred in sustaining the objection of the defendants to the question asked the witness, William H. Heuer, and in excluding the answer of the witness made to such question, which said question, objection, and answer are shown in the following from the record in this case:

"Q. What would you say is a fair rate for dredging in accordance with the contract entered into with the United States and the North American Dredging Company?"

"MR. LILIENTHAL. The same objections to this testimony that were made to the testimony of Mr. Hinds.

"The COURT. That contract was let?

"Mr. CLARK. Yes.

"The court reserved its ruling on the objection until the conclusion of the testimony and allowed the question to be answered provisionally, subject to the objection."

296 (The court finally sustained the objection and struck out the answer, each of which said rulings is assigned as error.)

"A. I think the price paid was a reasonable price, fourteen and 48/100 cents (\$.14 48/100) per yard."

VIII.

The court erred in sustaining all of the objections made to the questions propounded by the plaintiff and which were answered, and which tended to show that the work could be completed in the manner provided under the contract with the North American Dredging Company with less difficulty and at a lower price than under the terms and conditions of the contract between the Government and Rudolf Axman.

IX.

The court erred in excluding all of the testimony brought out by the plaintiff in such answers.

X.

The court erred in sustaining the objection of the defendants to the question asked the witness William Healey and in excluding the answer of the said witness made to such question, as shown by the following portion of and references to the record:

"Q. What would be a fair rate for performing the dredging required under this contract and depositing the material in deep water in accordance with provision 'B' of specification 36?

Mr. LILIENTHAL. To make the record plain, I will say the objection of the defendants is based on the ground that the court at most can admit testimony to show damage to the Government in
297 the difference between prosecuting the work diligently and not prosecuting the work diligently up to the time of the rescission, and any testimony showing a difference between the contract price and market price is irrelevant. That is the ground of the objection.

Mr. AITKEN. The same objection will go to this line of testimony?

The COURT. Yes, sir. The rulings will be reserved until the conclusion of the testimony. The questions may be answered provisionally, subject to the objections.

A. I should consider about 15½ cents the highest bid at that time.

Mr. CLARK. Q. And for depositing the material in the manner provided by the specification between Pinole Point and Lone Tree Point?

A. About 16½ cents."

(The court finally sustained the objections and struck out the answers, each of which said rulings is assigned as error.)

XI.

The court erred in sustaining the objection of the defendants to the question asked the witness, R. A. Perry, and in excluding the answer of the witness made to such question, which said question, objection, and answer are shown in the following from the record in this case:

"Q. In your judgment, was the price you offered a fair price for the work, 14 48/100 cents?

298 "Objected to by the defendants as incompetent, irrelevant, and immaterial upon the ground stated in an objection to a similar question asked of the witness, S. G. Hinds.

"The court reserved its ruling on the objection until the conclusion of the testimony and allowed the question to be answered provisionally subject to the objection."

(The court finally sustained the objection and struck out the answer, each of which said rulings is assigned as error.)

"A. Yes, sir; that was my judgment at that time."

XII.

The court erred in sustaining the objections made to the questions propounded to the witness, M. C. Harris, and the witness, John Hackett, and in striking out the testimony of such witnesses after the same had been provisionally allowed, which said rulings of the court are shown by the following references to the record:

"M. C. HARRIS, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

I am president of the American Dredging Company. I put in a bid at the time of the Axman contract for the dredging of San Pablo Bay. That is the time that the first contract was let. I understood at that time the requirements were that the spoil should be deposited between Lone Tree Point and Pinole Point. I understand generally the conditions under which the contract was finally performed. That it permitted the deposit of the spoil that was dredged in deep water. It would have cost more to carry out

299 the contract by depositing the spoil as required in the specifications between Pinole Point and Lone Tree Point than it would have cost to deposit it in deep water.

No cross-examination.

Direct examination by Mr. Clark.

John Hackett, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

I am in the dredging business in this vicinity and have been for 25 years. I understand the character of the work that is to be done in

the dredging of San Pablo Channel and remember the letting of the contract for the dredging. I understood that under the first contract that the provision was that the spoil should be deposited in the matter set forth in the specification, between Lone Tree Point and Pinole Point, and under the contract as finally carried out the spoil should be deposited in deep water. In my judgment it would have cost more to carry out the contract by depositing the spoil between Lone Tree Point and Pinole on the flats in the manner specified than it would have cost to carry it out by depositing it in deep water, and this cost would have been more when the contract was first let to Mr. Axman than it would afterwards.

No cross-examination.

The foregoing testimony of the witnesses, M. C. Harris and John Hackett, was all taken subject to the same objections as were made to the testimony of the witness S. C. Hinds, the rulings on these objections being reserved until the conclusion of the testimony."

300 The plaintiff in error assigns the final ruling of the court in excluding this testimony and in sustaining the objections as error.

XIII.

The court erred in granting the motions for nonsuit and each of them.

All of the foregoing rulings complained of were, as appears from the transcript, made immediately after the taking of testimony was concluded in this cause.

XIV.

The court erred in instructing the jury, over the objection of the plaintiff, as follows:

"Gentlemen of the jury, under the opinion of the Circuit Court of Appeals made in this cause, it becomes the duty of the court to instruct you to find a verdict in favor of the defendants in this cause, and you will do so accordingly."

XV.

The verdict of the jury is not supported by the evidence.

XVI.

The verdict of the jury is contrary to law and the court erred in accepting and receiving the said verdict.

XVIII.

The evidence excluded shows there was no material difference between the two contracts involved, that the work completed was the same improvement, and that the only variation from the original contract was in a respect merely incidental to its main purpose

301 and concerned the mere depositing of the debris resulting from the work.

Such evidence also showed the method of depositing the spoil allowed under the second contract greatly reduced the cost of the work.

Wherefore plaintiff prays that the judgment of the said Circuit Court of the United States for the Ninth Circuit, Northern District of California, be reversed and set aside and that it be ordered to enter an order granting the plaintiff a new trial in said action.

Dated January 21, 1911.

ROBT. T. DEVLIN,

United States Attorney, Attorney for Plaintiff.

[Endorsed]: Filed Jan. 21, 1911. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

RUDOLPH AXMAN AND AMERICAN BONDING COMPANY
of Baltimore (a corporation), defendants. }

Order allowing writ of error.

Upon motion of Robert T. Devlin, United States attorney for the Northern District of California, attorney for the plaintiff in the above-entitled cause, and upon filing the petition for a writ of error and assignment of errors herein,

302 It is ordered that a writ of error be, and it is hereby, allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit the judgment heretofore rendered herein and other matters and things in said petition and assignment set forth.

Dated January 21st, 1911.

WM. C. VAN FLEET, *Judge.*

[Endorsed]: Filed Jan. 21, 1911. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

RUDOLPH AXMAN AND THE AMERICAN BONDING COMPANY
of Baltimore (a corporation), defendants. }

No. 13,911.

Clerk's certificate to transcript of record.

I, Southard Hoffman, clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the

Northern District of California, do hereby certify the foregoing three hundred and eleven (311) pages, numbered from 1 to 311, inclusive, to be a full, true, and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$173.40; that said amount will be charged by me in my quarterly account against the United States for the quarter ending March 31st, 1911; and that the original writ of error and citation issued in said cause are hereto annexed.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this 21st day of February, A. D. 1911.
[SEAL.]

SOUTHARD HOFFMAN,

*Clerk of United States Circuit Court,
Ninth Judicial Circuit, Northern District of California.*

United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR.

VS.

RUDOLPH AXMAN AND AMERICAN BONDING Company of Baltimore (a corporation), defendants in error.

304

Writ of error [original].

UNITED STATES OF AMERICA, ss.:

The President of the United States to the honorable the judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between the United States of America, plaintiff in error and Rudolph Axman and the American Bonding Company of Baltimore, a corporation, defendants in error, a manifest error hath happened to the great damage of the said United States of America, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 20th day of February, 1911 next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected,

the said Circuit Court of Appeals may cause further to be done
 305 therein to correct that error, what of right, and according to
 the laws and customs of the United States, should be done.

Witness, the honorable Edward D. White, Chief Justice of the
 United States, the 21st day of January, in the year of our Lord one
 thousand nine hundred and eleven.

[SEAL.]

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States
for the Ninth Circuit, Northern District of California.
 By W. B. MALING, *Deputy Clerk.*

Allowed by

WM. C. VAN FLEET,
Judge.

Service of within writ and receipt of a copy thereof is hereby
 admitted this — day of —, 1911.

Attorneys for Defendant in Error American

Attorneys for Defendant in Error, American
Bonding Company of Baltimore.

Service of the within writ of error by copy admitted this 23rd day
 of January, 1911.

Attorney for Def. Axman.
 JESSE W. LILIENTHAL,
Atty. for Def. Am. Bonding Co.

Copy received Jan. 23, 1911, subject to all objections that may be
 urged on presentation.

AITKEN & AITKEN,
Attorneys for Def. Axman.

306 [Endorsed]: No. 13,914. In the Circuit Court of the United
 States for the N. Dist. of California. United States vs. Ru-
 dolph Axman et al. Writ of error. Filed Jan. 26, 1911. Southard
 Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

The answer of the judges of the Circuit Court of the United States
 of the Ninth Judicial Circuit in and for the Northern District of
 California.

The record and all proceedings of the plaint whereof mention is
 within made, with all things touching the same, we certify under
 the seal of our said court to the United States Circuit Court of
 Appeals for the Ninth Circuit, within mentioned, at the day and place
 within contained, in a certain schedule to this writ annexed as within
 we are commanded.

By the Court.

[SEAL.]

SOUTHARD HOFFMAN,
Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
 vs.
 RUDOLPH AXMAN AND AMERICAN BONDING COMPANY
 of Baltimore (a corporation), defendants in
 error.

307 Citation on writ of error [original].

UNITED STATES OF AMERICA, ss:

The President of the United States, to Rudolph Axman, and the American Bonding Company of Baltimore, a corporation, greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on February 20th, 1911, being within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States, for the Northern District of California, wherein the United States of America is the plaintiff in error and you are the defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Wm. C. Van Fleet, United States district judge for the Northern District of California, this 21st day of January, A. D. 1911.

WM. C. VAN FLEET,
*United States District Judge,
 Northern District of California.*

308 Service of within citation, by copy, admitted this — day
 of ———, 1911.

Attorneys for Defendant in Error, Rudolph Axman.

*Attorneys for Defendant in Error,
 American Bonding Company of Baltimore, a Corporation.*

Service of the within citation on writ of error by copy admitted this 23rd day of January, 1911.

Attorney for Axman.

JESSE W. LILIENTHAL,
Atty. for Def. Amer. Bonding Co.

Copy received Jan. 23, 1911, subject to all objections that may be urged on presentation.

AITKEN & AITKEN,
Attorneys for Def. Axman.

[Endorsed:] No. 13914. In the Circuit Court of the United States for the N. Dist. of California, United States vs. Rudolph Axman et al. Citation on writ of error. Filed Jan. 26, 1911. Southard Hoffman, clerk. By J. A. Schaertzer, deputy clerk.

309 [Endorsed:] No. 1959. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, plaintiff in error, *vs.* Rudolph Axman and American Bonding Company of Baltimore (a corporation), defendants in error. Transcript of record. Upon writ of error to the United States Circuit Court for the Northern District of California.

Filed February 21, 1911.

FRANK D. MONCKTON,
Clerk.

By MEREDITH SAWYER,
Deputy Clerk.

310 *United States Circuit Court of Appeals for the Ninth Circuit.*

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.

RUDOLPH AXMAN AND AMERICAN BONDING COMPANY OF } No. 1959.
Baltimore (a corporation), defendants in error.

Certificate of clerk U. S. Circuit Court of Appeals to printed transcript of record.

I, Frank D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three hundred and nine (309) pages, numbered from and including one (1) to and including three hundred and nine (309), to be a full, true, and correct copy of the printed transcript of record upon writ of error to the United States Circuit Court for the Northern District of California, in the above-entitled case, as the original thereof remains on file and of record in my office, the said copy having been printed under my supervision pursuant to the provisions of the twenty-third rule of the Rules of Practice of the said Circuit Court of Appeals.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 15th day of April, A. D. 1912.

[SEAL.]

F. D. MONCKTON, *Clerk.*

311 *United States Circuit Court of Appeals for the Ninth Circuit.*

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.

RUDOLPH AXMAN AND AMERICAN BONDING COMPANY } No. 1959.
of Baltimore (a corporation), defendants in }
error.

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

(Addenda.)

312 At a stated term, to wit, the October term, A. D. 1910, of the United States Circuit Court of Appeals for the Ninth Circuit,

held at the court room, in the city and county of San Francisco, on Friday, the nineteenth day of May, in the year of our Lord one thousand nine hundred eleven.

Present: Honorable William B. Gilbert, circuit judge; Honorable Cornelius H. Hanford, district judge; Honorable Charles E. Wolverton, district judge.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,	} No. 1959.
<i>vs.</i>	
RUDOLPH AXMAN AND AMERICAN BONDING COMPANY, a corporation, defendants in error.	

Order of submission.

By consent of Mr. Assistant United States Attorney Parker J. Maddox, counsel for the plaintiff in error, and Mr. Jesse W. Lilienthal, counsel for the defendants in error, ordered appeal in the above-entitled cause submitted to the court for consideration and decision on briefs, without oral argument.

313 *United States Circuit Court of Appeals for the Ninth Circuit.*

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,	} No. 1959.
<i>vs.</i>	
RUDOLPH AXMAN AND AMERICAN BONDING COMPANY, of Baltimore (a corporation), Defendants in Error.	

Opinion U. S. Circuit Court of Appeals.

Writ of error to the Circuit Court of the United States for the Northern District of California. Judgment affirmed.

Robt. T. Devlin, United States Attorney,
Parker S. Maddox, Assistant United States Attorney. For the United States.

Aitken & Aitken, For Rudolph Axman, Defendant in Error.
Jesse W. Lilienthal, For the American Bonding Co.

Before Gilbert, Circuit Judge, and Hanford and Wolverton, District Judges.

314 Hanford, District Judge delivered the opinion of the Court: This is an action on a contractor's bond in which, on a former presentation of the case to this Court, a judgment in favor of the United States was reversed for reasons set forth in the opinion reported in 167 Fed. Rep. 910. The brief filed in behalf of the plaintiff in error contains the candid admission that upon a new trial being had in the Circuit Court the Government offered and relied upon the evidence introduced upon the first trial; and

that the Circuit Court, in accordance with the opinion rendered by this court, held that there was no liability on the part of the American Bonding Company and that unless this court shall reconsider the opinion heretofore rendered, the decision of the case must be adverse to the United States.

The case has been brought to this court by a writ of error and to authorize a reversal of the judgment of the Circuit Court it would be necessary to find, in the record, an error committed by the Circuit Court prejudicial to the rights of the government. In view of the admissions above mentioned it is obvious that no reversible error can be found, because, the former decision by this court established the law of the case for the trial court. The rule applicable to the case, as now presented, is stated in the opinion of the Supreme Court in *Roberts v. Cooper*, 20 How. 481, as follows:—

“It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be heard or examined upon the second.”

This rule has been consistently observed by this court. *Montana Mining Co. v. St. Louis etc. Co.*, 147 Fed. 903; *San 315 Pedro, L. A. & S. L. R. Co. vs. Thomas*, 187 Fed. 790.

After rendering its opinion on the former hearing of the case this court considered and denied an application for a re-hearing and now the Court can do no less than to declare the litigation terminated, subject to any right which the government may have to apply for a review of the case by the Supreme Court.

Affirmed.

(Endorsed:) Opinion. Filed Feb. 20, 1912, F. D. Monckton, Clerk.

316 *United States Circuit Court of Appeals for the Ninth Circuit.*

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,	} No. 1959.
<i>vs.</i>	
RUDOLPH AXMAN AND AMERICAN BONDING COMPANY OF Baltimore (a Corporation), Defendants in Error.	

Judgment U. S. Circuit Court of Appeals.

In Error to the Circuit Court of the United States for the Northern District of California.

This Cause came on to be heard on the Transcript of the Record from the Circuit Court of the United States for the Northern District of California, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment. Filed and Entered Feb. 20, 1912. F. D. Monckton, Clerk.

317 At a stated term, to-wit: the October term, A. D. 1911 of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the City and County of San Francisco, on Tuesday the twelfth day of March in the year of our Lord one thousand nine hundred and twelve.

Present: The Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable Charles E. Wolvertson, District Judge.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,	} No. 1959.
<i>vs.</i>	
RUDOLPH AXMAN, AND AMERICAN BONDING COMPANY OF Baltimore, (a Corporation), Defendants in Error.	

Order staying issuance of mandate.

Upon motion of Mr. Assistant United States Attorney Earl H. Pier, counsel for the plaintiff in error, and pursuant to the stipulation of counsel this day filed therefor, it is Ordered that the issuance of a mandate of this Court under rule 32 in the above-entitled cause be, and hereby is stayed thirty (30) days from and after March 21, 1912.

318 *In the United States Circuit Court of Appeals for the Ninth Circuit.*

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,	}
<i>vs.</i>	
RUDOLPH AXMAN AND AMERICAN BONDING COM- pany of Baltimore, a corporation, defendants in error.	

Assignment of errors.

Now comes the plaintiff in error, The United States of America, and in connection with its petition for a writ of error herein, makes the following assignment of errors wherein the United States Circuit Court of Appeals erred in affirming the judgment of the Circuit Court herein in this, to wit:

I.

In holding and deciding that the trial court properly sustained the objection interposed by the defendants to the offer in evidence of a contract between the North American Dredging Company and the United States of America under which it is claimed by the plaintiff the work to be done is completed, the objection following immediately after the following offer:

"Mr. CLARK.—We offer the contract between the United States of America, executed through Colonel W. H. Heuer acting on behalf of the Government, and the North American Dredging Company."

And the objection to such offer being:

319 "To which the defendants then and there severally objected upon the ground that it is incompetent, irrelevant, and immaterial, not within the issues of the pleadings, and that the issue of the pleadings is that after the annulment of the contract the work was readvertised, and on June 21st a contract was made with the North American Dredging Company of San Francisco to do the work left undone by the defendants herein; that the contract shown to have been made with the defendant Axman was to dig a channel 27,000 feet in length, 300 feet wide, and 30 feet deep, and deposit the spoil at a particular place to be designated by the engineer in charge between Pinole Point and Lone Tree Point, behind bulkheads to be built by him. The allegation of the complaint is—they readvertised and let the work to be done. The contract now offered in evidence shows that the work let in the contract offered was to dig a channel 27,000 feet in length, and to deposit the spoil at a certain place called 'The Sisters,' in depth of water exceeding 50 feet deep.

"Furthermore, according to plaintiff's Exhibit 'A' it provided that if there was any change whatever in such contract it should be agreed upon by the contracting parties, sanctioned by the chief engineer, and put in writing, and there is no evidence here that the changes contained in the document now offered were agreed upon by the contracting parties, sanctioned by the chief engineer, and put in writing."

The court reserved its ruling on the objection until the conclusion of the testimony and allowed the contract to be received provisionally subject to the objection.

320 (The trial court finally sustained the objection and struck out the contract, the affirming of which said ruling so finally made is assigned as error; as in the ruling of the court sustaining the trial court's ruling striking out the contract.)

II.

In holding and deciding that the trial court properly sustained the objections made by the defendants in error to the questions put by the plaintiff to the witness S. C. Hinds and in excluding the answers of said witness, the questions, objections, and answers being contained in the following portion of the record:

"Q. Under the terms of the proposal that you made for the performance of the work, and your investigation with a view to determine what would be a fair rate for the performance of that work, you took into consideration this provision in the specifications—'to deposit the spoil in water exceeding fifty feet in depth lying within an area bounded by lines drawn from The Sisters to Point San Pablo, then to Marin Islands, and thence back to The Sisters. The top of any pile shall not be higher than forty feet below the level of low tide.' That was the provision in the specification for the deposit of spoil to which you directed your bid?

"To which question the defendants severally objected upon the following ground: That it is irrelevant, immaterial, and incompetent, that the only breach of contract appearing in the contract is the failure to prosecute the work with due diligence, and on the further ground that the effect of the admission of this contract of the North

American Dredging Company includes in effect a ruling by the
321 court that the letting of that contract was a proper method to determine the damage that had accrued to the Government, and therefore any testimony now offered as to some bid put in by the Atlantic Gulf & Pacific Company, and not specified, not involving any expenditure of money on the part of the Government, is irrelevant and immaterial and not within the issue.

"The Court reserved its ruling upon the objection until the conclusion of the testimony and allowed the question to be provisionally answered, subject to the objection."

(The trial court finally sustained the objections and struck out the answers, the affirming of which said rulings of the trial court by the Circuit Court of Appeals are each assigned as error.)

"Yes, sir.

"Mr. CLARK.—Q. You made no bid at that time directed to this particular provision in the specifications; that is, the provision for the deposit of the spoil between Lone Tree Point and Pinole Point? Your bid was directed to the specification to the effect that the spoil should be deposited in deep water, as I have mentioned?

"Mr. LILLIENTHAL. It may be understood that the objection runs to all this line, so that I may not interrupt all the time.

"The COURT. Yes.

"The court reserved its rulings upon the objection until the conclusion of the testimony and allowed the question to be answered provisionally subject to the objection."

322 (The trial court finally sustained the objection and struck out the answers, the affirming of each of which rulings of the trial court by the Circuit Court of Appeals is assigned as error.)

"A. Yes, sir.

"Mr. CLARK. Q. What would you say at that time was a fair rate for the doing of that work, for the dredging of some 2,285,000 cubic yards in the channel in accordance with the specifications which you observed at that time? Would you say that the amount mentioned in your bid here was a fair rate; that is, 14½ cents?

"A. Yes, sir."

III.

In holding and deciding that the trial court properly excluded the bid of the Atlantic Gulf and Pacific Company and in sustaining the objection of the defendants thereto, the offer of said bid and the objections of the defendants thereto being shown in the following from the record herein:

"Mr. CLARK. We desire to offer the bid put in by this company, the Atlantic Gulf & Pacific Company, for the purpose of showing

that the rate at which the Government did do this work, 14 48/100 cents per cubic yard, is a fair rate, this witness having testified that 14½ cents per cubic yard is a fair rate.

"The Court. Let it be introduced.

"The defendants severally objected to the introduction of the said bid upon the ground that it was irrelevant, incompetent, and immaterial for the reasons stated in the prior objection.

"The court reserved its ruling on the objection until the conclusion of the evidence and allowed the bid to be received provisionally subject to the objection."

323 (The trial court finally sustained the objection and struck out the bid, the affirming of each of which said rulings of the trial court by the Circuit Court of Appeals is assigned as error.)

"Said bid was received in evidence and marked Plaintiff's Exhibit 'H.' The work to be done under said bid was in all respects the same as the work to be done by the North American Dredging Company under its contract (Plaintiff's Exhibit 'G'), said bid providing that the contractor should deposit spoil in the place of deposit designated under the letter 'b' in the 26th paragraph of the specifications included in said North American Dredging Company contract."

IV.

In holding and deciding that the trial court properly sustained the objection made by the defendants in error to the question put to the witness Hinds and in excluding the answer of said witness, which said question and objection and answer are shown in the following portion of the record in this cause:

"Q. From the investigation made by you, from your experience as a contractor in the performance of this kind of work, would it cost less to do it in the way you did do it than to have deposited the spoil behind the line drawn between the extremities of the two points, Point Pinole and Lone Tree Point?

"The defendants severally objected to this question upon the ground that it was irrelevant, incompetent, and immaterial for the reasons stated in the last objection.

"The court reserved its ruling upon the objection until the conclusion of the testimony and allowed the question to be answered provisionally subject to the objection.

324 (The trial court finally sustained the objection and struck out the answers, the affirming of each of which said rulings of the trial court by the Circuit Court of Appeals is assigned as error.)

"A. I believe it would."

V.

In holding and deciding that the trial court properly sustained the objection of the defendants to the question asked the witness, S. C. Hinds, and in excluding the answer of the witness made to

such question, which said question, objection, and answer are shown in the following from the record herein:

"Q. It would have cost less, in your judgment, to perform the work as you did perform it than it would to have placed the spoil behind the line drawn from Lone Tree Point to Pinole Point?

"The defendants severally objected to this question upon the ground that it was irrelevant, incompetent, and immaterial for the reasons stated in the last objection.

The court reserved its ruling upon the objection until the conclusion of the testimony and allowed the question to be answered provisionally, subject to the objection."

(The trial court finally sustained the objection and struck out the answer, the affirming of each of which said rulings of the trial court by the Circuit Court of Appeals as assigned as error.)

"Yes, sir."

VI.

In holding and deciding that the trial court properly sustained the objection of the defendants to the questions asked the witness, S. C. Hinds, and in excluding the answer of said witness made to such question, which said question, objection, and answer are shown in the following from the record in this case:

"Q. In accordance with this requirement: 'To deposit the spoil as near the south shore as practicable, within lines drawn between Point Pinole and Lone Tree Point, at such places as may be designated by the engineer officer in charge; and to impound the material behind bulkheads of suitable construction, subject to approval by the engineer officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract.' You understand that provision?

"The defendants severally objected to this question upon the ground that it was irrelevant, incompetent, and immaterial for the reasons stated in the last objection.

"The court reserved its ruling upon the objection until the conclusion of the testimony and allowed the question to be answered provisionally subject to the objection."

(The trial court finally sustained the objection and struck out the answer, the affirming of each of which said rulings of the trial court by the Circuit Court of Appeals is assigned as error.)

"A. Yes, sir.

"WITNESS (continuing). I understood your question to relate to the offer of my company to perform the work covered by the specifications for the third reletting of the same. The Atlantic Gulf & Pacific Company did not actually perform the work."

VII.

In holding and deciding that the trial court properly sustained the objection of the defendants to the question asked the witness,

Wm. H. Heuer, and in excluding the answer of the witness made to such question, which said question, objection, and answer
326 are shown in the following from the record in this case:

"Q. What would you say is a fair rate for dredging in accordance with the contract entered into with the United States and the North American Dredging Company?

"Mr. LILIENTHAL. The same objections to this testimony that were made to the testimony of Mr. Hinds.

"The COURT. That contract was let?

"Mr. CLARK. Yes.

"The court reserved its ruling on the objection until the conclusion of the testimony, and allowed the question to be answered provisionally subject to the objection."

(The trial court finally sustained the objection and struck out the answer, the affirming of each of which said rulings of the trial court by the circuit court of appeals is assigned as error.)

"A. I think the price paid was a reasonable price, fourteen and 48/100 cents (\$.14 48/100) per yard."

VIII.

In holding and deciding that the trial court properly sustained all of the objections made to the questions propounded by the plaintiff in error, which were answered and which tended to show that the work could be completed in the manner provided under the contract with the North American Dredging Company with less difficulty and at a lower price than under the terms and conditions of the contract between the Government and Rudolph Axman.

IX.

In holding and deciding that the trial court properly excluded all the testimony barred out by the plaintiff in error in such answers.

327

X.

In holding and deciding that the trial court properly sustained the objection of the defendants in error to the questions asked the witness William Healey and in excluding the answer of the said witness made to such question, as shown by the following portion of the record:

"Q. What would be a fair rate for performing the dredging required under this contract and depositing the material in deep water in accordance with provision 'B' of specification 36?

Mr. LILIENTHAL. To make the record plain, I will say the objection of the defendants is based on the ground that the court at most can admit testimony to show damages to the Government in the difference between prosecuting the work diligently and not prosecuting the work diligently up to the time of the rescission, and any testi-

mony showing a difference between the contract price and market price is irrelevant. That is the ground of the objection.

Mr. AITKEN. The same objection will go to this line of testimony?

The COURT. Yes, sir. The rulings will be reserved until the conclusion of the testimony. The questions may be answered provisionally subject to the objections.

A. I should consider about 15½ cents the highest bid at that time.

Mr. CLARK. Q. And for depositing the material in the manner provided by the specification between Pinole Point and Lone Tree Point?

A. About 16½ cents."

(The trial court finally sustained the objections and struck out the answers, the affirming of each of which said rulings of the trial court by the circuit court of appeals is assigned as error.)

XI.

In holding and deciding that the trial court properly sustained the objection of the defendants to the question asked the witness R. A. Perry and in excluding the answer of the witness made to such question, which said question, objection, and answer are shown in the following from the record in this case:

"Q. In your judgment was the price you offered a fair price for the work, 14 48/100 cents?

"Objected to by the defendants as incompetent, irrelevant, and immaterial upon the ground stated in an objection to a similar question asked of the witness S. G. Hinds.

"The court reserved its ruling on the objection until the conclusion of the testimony and allowed the question to be answered provisionally subject to the objection."

(The trial court finally sustained the objection and struck out the answer, the affirming of each of which said rulings of the trial court by the circuit court of appeals is assigned as error.)

"A. Yes, sir; that was my judgment at that time."

XII.

In holding and deciding that the trial court properly sustained the objection made to the questions propounded to the witness M. C. Harris and the witness John Hackett and in striking out the testimony of such witnesses after the same had been provisionally allowed. Said rulings of the court are shown by the following references to the record:

329 "M. C. Harris, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

I am president of the American Dredging Company. I put in a bid at the time of the Axman contract for the dredging of San Pablo Bay. That is the time that the first contract was let. I understood at that time the requirements were that the spoil should be deposited between Lone Tree Point and Pinole Point. I understand generally

the conditions under which the contract was finally performed. That it permitted the deposit of the spoil that was dredged in deep water. It would have cost more to carry out the contract by depositing the spoil as required in the specifications between Pinole Point and Lone Tree Point than it would have cost to deposit it in deep water.

No cross-examination.

Direct examination by Mr. Clark.

John Hackett, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

I am in the dredging business in this vicinity and have been for 27 years. I understand the character of the work that is to be done in the dredging of San Pablo Channel and remember the letting of the contract for the dredging. I understood that under the first contract the provision was that the spoil should be deposited in the matter set forth in the specification between Lone Tree Point and Pinole Point, and under the contract as finally carried out the spoil should be deposited in deep water. In my judgment it would have cost more to carry out the contract by depositing the spoil between Lone

Tree Point and Pinole on the flats in the manner specified than
330 it would have cost to carry it out by depositing it in deep water, and this cost would have been more when the contract was first let to Mr. Axman than it would afterwards.

No cross-examination.

The foregoing testimony of the witnesses M. C. Harris and John Hackett was all taken subject to the same objections as were made to the testimony of the witness S. C. Hinds, the rulings on these objections being reserved until the conclusion of the testimony."

The plaintiff in error assigns as error the ruling of the Circuit Court of Appeals sustaining the ruling of the trial court in excluding this testimony and in sustaining the objections thereto.

XIII.

In affirming that the trial court properly granted the motions for nonsuit and each of them.

All of the foregoing rulings by the trial court complained of were, as appears from the transcript, made immediately after the taking of testimony was concluded in this cause.

XIV.

In holding and deciding that the trial court properly instructed the jury over the objection of the plaintiff in error as follows:

"Gentlemen of the jury, under the opinion of the Circuit Court of Appeals made in this cause it becomes the duty of the Court to instruct you to find a verdict in favor of the defendants in this cause and you will do so accordingly.

XV.

In holding and deciding that the verdict of the Jury was supported by the evidence.

331 XVI.

In holding and deciding that the verdict of the Jury was in accordance with law and that the trial court properly accepted and received said verdict.

XVII.

In holding and deciding that all matters assigned as error herein had been decided adversely to the contention of the plaintiff in error in the case of United States of America, Plaintiff in Error, vs. Rudolph Axman and American Bonding Company of Baltimore, a corporation, defendants in error, reported in 167 Fed. Rep., 910.

XVIII.

In holding and deciding that the rulings of the trial court were in accordance with the views expressed by said Circuit Court of Appeals in said case of United States of America, Plaintiff in Error, vs. Rudolph Axman and American Bonding Company of Baltimore, a corporation, defendants in error.

XIX.

The evidence excluded shows there was no material difference between the two contracts involved, that the work completed was the same improvement, and that the only variation from the original contract was in a respect merely incidental to its main purpose and concerned the mere depositing of the debris resulting from the work.

Such evidence also showed the method of depositing the spoil allowed under the second contract greatly reduced the cost of the work.

332 XX.

That said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court that plaintiff take nothing and in favor of the defendants and each of them and against the plaintiff; for the reason that under the proofs and under the proper interpretation of the contract and the bond the defendants were liable for the amount of the demand and for the further reason that the proofs constituted a valid cause of action for the relief demanded.

Wherefore plaintiff in error prays that the judgment of said United States Circuit Court of Appeals for the Ninth Circuit, Northern

District of California, be reversed and set aside and that it be ordered to enter an order reversing the action of said Circuit Court of Appeals and directing said Circuit Court of Appeals to grant the plaintiff in error a new trial on said action.

Dated March 20th, 1912.

ROBT. T. DEVLIN,
*United States Attorney,
Attorney for Plaintiff in Error.*

Service of the within assignment of errors admitted this 12th day of April, 1912.

JESSE W. LILIENTHAL,
Attorney for Amending Bonding Co.

Copy of the within assignment of errors received this 15th day of April, 1912.

AITKEN & AITKEN,
Attorneys for Rudolf Axman.

(Endorsed:) Assignment of Errors. Filed Apr. 15, 1912. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

333 *United States Circuit Court of Appeals for the Ninth Circuit.*

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,	} No. 1959.
<i>vs.</i>	
RUDOLPH AXMAN AND AMERICAN BONDING COMPANY, of Baltimore (a corporation), defendants in error.	

Certificate of clerk U. S. Circuit Court of Appeals to proceedings and transcript of record upon return to writ of error.

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing twenty-three (23) pages, numbered from and including one (1) to and including twenty-three (23), to be a true copy of the assignment of errors and of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit, including the opinion filed therein, as the same remain on file and of record in my office, and that the same, in connection with the preceding certified copy of the printed transcript of record, constitute a true copy of the complete record in the above-entitled case and the transcript of record upon return to the annexed writ of error therein from the Supreme Court of the United States.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this fifteenth day of April, A. D. 1912.

[SEAL.]

F. D. MONCKTON, *Clerk.*

334 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States Circuit Court of Appeals for the Ninth Circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between the United States of America, plaintiff in error, and Rudolph Axman and American Bonding Company, of Baltimore, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Edward D. White, Chief Justice of the United States, the 25th day of March, in the year of our Lord one thousand nine hundred and twelve.

[SEAL.]

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

Allowed by

JOSEPH MCKENNA,

Associate Justice of the

Supreme Court of the United States.

335 Service of the within writ of error admitted this 12th day of April, 1912.

JESS W. LILIENTHAL,

Attorney for American Bonding Co.

Copy of the within writ of error received this 15th day of April, 1912.

AITKEN & AITKEN,

Attorneys for Rudolf Axman.

Return to writ of error.

The answer of the judges of the United States Circuit Court of Appeals for the Ninth Circuit to the within writ of error:

As within we are commanded, we certify under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is

within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the fifteenth day of April, A. D. 1912, duly lodged in the cause in this court for the within named defendants in error.

By the court:

[SEAL.]

F. D. MONCKTON,
*Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit.*

336 (Endorsed:) Docketed. No. 1959. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, plaintiff in error, *vs.* Rudolph Axman et al., defendants in error. Original writ of error from Supreme Court of the United States and return thereto. Filed Apr. 15, 1912. F. D. MONCKTON, clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

337 UNITED STATES OF AMERICA, *ss*:

To Rudolph Axman and American Bonding Company of Baltimore, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, Associate Justice of the Supreme Court of the United States, this 25th day of March, in the year of our Lord one thousand nine hundred and twelve.

JOSEPH MCKENNA,
Associate Justice of the Supreme Court of the United States.

338 On this —— day of ——, in the year of our Lord one thousand nine hundred and ——, personally appeared —— before me, the subscriber, ——, and makes oath that he delivered a true copy of the within citation to ——.

Sworn to and subscribed the —— day of ——, A. D. 190——.

Service of the within citation admitted this 12th day of April, 1912.

JESSE W. LILIENTHAL,
Attorney for American Bonding Co.

Copy of the within citation received this 15th day of April, 1912.

AITKEN & AITKEN,
Attorneys for Rudolf Axman.

339 (Endorsed:) Docketed. No. 1959. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, plaintiff in error, *vs.* Rudolph Axman et al., defendants in error. Original citation on writ of error. Filed Apr. 15, 1912. F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

(Indorsement on cover:) File No. 23,180. U. S. Circuit Court of Appeals, 9th Circuit, Term No. 628. The United States of America, plaintiff in error *vs.* Rudolph Axman and American Bonding Company of Baltimore. Filed April 23d, 1912. File No. 23,180.



In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFF
 in error,
 vs.
 AMERICAN BONDING COMPANY OF BALTIMORE,
 a corporation, and Rudolph Axman, de-
 fendants in error.

Stipulation as to addition to record.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the opinion of the United States Circuit Court of Appeals for the Ninth Circuit, known as the first opinion, hereto attached, shall be added to the original transcript of the record now on file in the Supreme Court.

Dated ———, 1912.

WM. MARSHALL BULLITT,
Solicitor General.

EDW. DUFFY,
*Counsel for Defendant in Error,
 American Bonding Company.*

JOHN R. AITKEN,
Counsel for Rudolph Axman.

b Indorsed: Form No. 680. No. ———. In the Supreme Court of the United States for the ——— of ———. United States vs. American Bonding Co. of Baltimore, a corporation. Stipulation as to addition to record.

1 In the United States Circuit Court of Appeals for the Ninth Circuit.

AMERICAN BONDING COMPANY OF BALTIMORE (A
 corporation), plaintiff in error,
 vs.
 UNITED STATES OF AMERICA, DEFENDANT IN ERROR. } No. 1570.

In error to the United States Circuit Court for the Northern District of California.

This was an action at law brought by the United States against Rudolf Axman on an agreement dated November 21, 1902, and entered into between Lieutenant Colonel W. H. Heuer, of the Corps of Engineers, for and on behalf of the United States, and Rudolf Axman, for the dredging of a channel thru the shoal in San Pablo Bay in California. The action was also against the plaintiff

in error on a bond of the same date guaranteeing the fulfillment of the contract. The guarantee bond is in the sum of fifty thousand (\$50,000.00) dollars. The action was brought to recover from Axman the full sum of sixty-five thousand five hundred and 94/100 (\$65,500.94) dollars, and from the plaintiff in error the sum of fifty thousand (\$50,000.00) dollars, for the alleged failure on the part of Axman to prosecute faithfully or diligently or at all the work in accordance with the specifications and requirements of said contract

and for his refusal to complete or perform the same. The case was tried before the court and jury and a judgment entered in favor of the defendant in error and against Axman and the plaintiff in error for the sum of thirty-nine thousand nine hundred two and 59/100 (\$39,902.59) dollars and costs. The case is here on writ of error sued out by the American Bonding Company.

JESSE W. LILIENTHAL,

Attorney for the Plaintiff in Error.

JOHN R. AITKEN,

Amicus Curiae.

CHAS. A. SHURTLEFF,

FRANK W. AITKEN,

Of Counsel.

ROBT. T. DEVLIN,

United States Attorney,

GEORGE CLARK,

Asst. United States Attorney,

Attorneys for the Defendant in Error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge:

The dredging contract entered into between Colonel Heuer of the Corps of Engineers, for and on behalf of the United States, and Rudolf Axman, on November 21st, 1902, provided, among other things, in Paragraph I, that "the said Rudolf Axman will do such

dredging in San Pablo Bay, California, as may be required by the said W. H. Heuer, in accordance with the specifications hereunto annexed, and that he, the said W. H. Heuer, or his successor, will pay to the said Rudolf Axman the sum of eleven and forty-four one-hundredths cents per cubic yard for all such dredging as shall be done in strict accordance with the said specifications hereunto annexed, and is ordered and accepted by the said W. H. Heuer, or his agent."

In paragraph 3 of the agreement it was provided:

"The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraphs 31 and 46 of the attached specifications."

In paragraph 4 of the agreement it was provided:

"If, in any event, the party of the second part (Axman) shall delay or fail to commence with the delivery of the material, or the

performance of the work, on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power with the sanction of the Chief of Engineers to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price

4 herein stipulated to be paid the party of the second part for completing the same."

It was provided in paragraph 6 of the agreement that:

"If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War; provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred."

The specifications referred to in the agreement provided in paragraph 31 that:

"The contractor will be required to commence work under the contract within sixty days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with faithfulness and energy, and to complete it within twenty-eight (28) months after the date of the commencement."

In paragraph 35 it was provided that:

"The shoal to be dredged is in San Pablo Bay, California; is about 5 miles in length, and has a least depth of 19 feet at low water. It extends from Pinole Point to Lone Tree Point, and is distant $1\frac{1}{4}$ to $1\frac{1}{2}$ statute miles N. W. of the points referred to. The average depth of the excavation is about 9 feet "

5 In paragraph 36 it was provided:

"The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean

low water, and a length of about 27,000 feet; to deposit the spoil as near the south shore as practicable, within lines drawn between Pinole Point and Lone Tree Point, at such places as may be designated by the engineer officer in charge; and to impound the material behind bulkheads or dykes of suitable construction, subject to approval by the engineer officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract."

In paragraph 38 it was provided:

"Material dredged outside the designated lines of excavation, below the depths provided in paragraph 37, or deposited otherwise than as herein specified, directed, and agreed upon, will not be paid for. The total amount to be dredged is estimated at 2,721,000 cubic yards, more or less."

In paragraph 39 it was provided:

"All dredged material is to be deposited within the limits of the area described in paragraph 36. The method of deposit will be subject to approval by the engineer officer in charge."

In paragraph 40 it was provided:

"The part of the area available for the deposit of material from scows has an average width of about $\frac{3}{4}$ of a mile. Its distance from the site of dredging varies from 1 to 2 miles. The location of the place of deposit, the depths of the water therein, and the location of the dredging are shown on maps on file in this office."

In paragraph 46 it was provided:

"The work must progress at the rate of at least 100,000 cubic yards per month, and to entitle the contractor to the monthly payments provided for in paragraph 30 of these specifications an average of not less than 100,000 cubic yards per month must have been dredged and deposited; the calculation of averages to be made from the day on which the contractor requires the work to be commenced."

In paragraph 48 it was provided:

"If at any time after the date set for beginning work it shall be found that the required minimum rate of progress is not being maintained, the engineer officer in charge shall have the power, after due notice in writing to the contractor, to employ such additional plant or purchase such materials as may be necessary to ensure the completion of the work within the time specified, charging the cost thereof against such sums as may be due or become due to the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract as provided for in the form of contract to be entered into."

In paragraph 49 it was provided:

"Work must be pushed continuously, except on Sundays and legal holidays. Night work will be permitted, when proper provision must be made in all cases by the contractor at his expense for the comfort of the inspectors and other United States employees who may be on the work."

On January 3, 1903, Colonel Heuer notified Axman that his contract had been approved by the Chief of Engineers, U. S. Army, and that, in accordance with its terms, work must be commenced within sixty days from the date of the notification. This was March 3, 1903. Axman actually began work on February 24, 1903, but he did not dredge and remove the minimum of 100,000 cubic yards as required by paragraph 46 of the specifications. On December 24, 1903, Colonel Heuer sent Axman the following notice:

7 "I hereby notify you that the contract entered into by you with me on November 21, 1902, for dredging in San Pablo Bay, California, is this day annulled, as provided for in paragraph 4 of the contract, on account of failure to comply with the requirements of the specifications."

On the same day a similar notice was sent to the plaintiff in error. On June 21, 1904, Colonel Heuer entered into a contract with the North American Dredging Company to "do such dredging in San Pablo Bay, California, as may be required by the said W. H. Heuer, in accordance with the specifications hereunto annexed and deposit the spoils in place of deposit (b) as described in paragraph numbered thirty-six in said specifications hereunto annexed; and that he the said W. H. Heuer, or his successor, will pay to the said North American Dredging Company the sum of fourteen and forty-eight one hundredths cents per cubic yard for all such dredging as shall be done in strict accordance with the specifications hereunto annexed."

Paragraph 36 (b) of the specifications referred to in the agreement with the North American Dredging Company provided as follows:

"To deposit the spoil in water exceeding 50 feet in depth, lying within the area bounded by lines drawn from The Sisters to Point San Pablo, thence to Marin Islands, and thence back to The Sisters. The top of any pile shall not be higher than 40 feet below the level of low tide."

Paragraph 39 provides as follows:

"Material dredged outside the designated lines of excavation, below the depths provided in paragraph 38, or deposited otherwise than as herein specified, directed and agreed upon, will not be paid for. The total amount to be dredged is estimated at 2,285,000 cubic yards, more or less."

Paragraph 40 provides as follows:

8 "All dredged material is to be deposited within the limits of the area described in paragraph 36. The method of deposit will be subject to approval by the Engineer officer in charge."

Paragraph 41 provides as follows:

"... In place of deposit (b) the deep part of the area available for the deposit of material from scows is triangular in shape, covering an area of about one square mile. Its distance from the nearest point of the dredging is about 5 statute miles. The location of the places of deposit, the depths of water therein, and the location of the dredging, are shown on maps on file in this office."

Paragraph 42 provides as follows:

"Any deposit outside of authorized dumping grounds will render the contract liable to be annulled."

The complaint set forth the provisions of the dredging contract entered into by Colonel Heuer with Axman and the guaranteeing of the contract by the plaintiff in error.

It is alleged that Axman failed to prosecute faithfully or diligently or at all the work in accordance with the specifications and requirements of said contract and did refuse to complete and perform the same or any part thereof and did abandon said contract and refuse to do the work in said contract provided or any part thereof; that by reason of Axman's violation of the provisions of the contract Colonel Heuer annulled the same; that after the annulment the work was re-advertised, and a contract was made with the North American Dredging Company "to do the work left undone" by Axman; that the North American Dredging Company carried out the work and completed the contract at the cost of \$311,991.29, while the cost of the same work at the price for which Axman contracted to do it would have amounted to \$246,490.35, or a difference of

9 \$65,500.94; that by reason of Axman's failure to carry out his contract the United States was compelled to pay and did pay the sum of \$65,500.94 more than it would have cost had Axman carried out his contract according to its terms and conditions. Judgment was asked against Axman in the sum of \$65,500.94 and against the American Bonding Company in the sum of \$50,000.00. The plaintiff in error interposed a demurrer to this complaint on the grounds, among others, that the complaint did not state facts sufficient to constitute a cause of action, and that the complaint was uncertain in the following particulars, among others, that it did not appear therefrom:

(1) Whether any of the sums alleged to have been paid said North American Dredging Company were expended by said Heuer in the completion of said contract of November 21, 1902, between Axman and Heuer.

(2) Whether the work alleged in the complaint to have been done by the North American Dredging Company was done under the same specifications attached to said Axman contract and in said complaint referred to.

The demurrer was overruled and thereupon the plaintiff in error filed its separate answer in which it denied generally the allegations of the complaint and specifically denied that Axman abandoned his contract and denied that a contract was made with the North American Dredging Company "to do the work left undone" by Axman as provided in his contract, and by way of a further answer and defense it was alleged that "said North American Dredging Company did not deposit, nor did any other person or corporation deposit, any part of said material or 'spoil' as near the south shore as practicable within lines drawn between said Pinole Point and Lone Tree

Point at the place designated by the engineer officer in charge, or impound the said material between bulkheads or dykes of suitable construction, or otherwise, as provided for and required by the contract made between the said W. H. Heuer and Axman."

For a further answer and defense it was alleged that Colonel Heuer was openly hostile and unfriendly to Axman, and specific acts are alleged which it is charged had for their purpose the impeding and delaying of the work with the intent to prevent Axman from carrying out his contract and performing the work as required in the specifications. The substance of these charges is that Colonel Heuer acted arbitrarily and without just cause in the conditions and requirements imposed upon Axman during the progress of the work and in finally annulling the contract.

The case was tried before the court and a jury, and among other instructions given to the jury was an instruction to the effect that Axman had excavated 196,000 cubic yards, for which he should be allowed a credit of \$22,422.40. The verdict was for the United States for the sum of \$39,902.59.

No evidence was introduced tending to show that Axman abandoned his contract or that he refused to do the work in said contract provided. The defense that Colonel Heuer acted arbitrarily and without just cause in imposing conditions and requirements upon Axman in executing the work and in finally annulling the contract, involved questions of fact which we think were submitted to the jury with proper instructions. A number of assignments of error relate to the action of the court in admitting evidence concerning the contract with the North American Dredging Company and the instructions of the court with respect thereto. They all present the single question whether in the contract entered into by Colonel Heuer with the North American Dredging Company "to do the work left undone" by Axman there was a material departure from the contract.

This is not a suit to recover generally whatever damages
11 the United States would have sustained had Axman abandoned his contract, but a suit for damages under the express stipulations of the contract which are set forth in the complaint and made the basis of the action. These stipulations are: "If -----, the party of the second part -----, shall, in the judgment of the engineer in charge, fail to prosecute faithfully the work in accordance with the specifications and requirements of this contract, -----, the party of the first part -----, shall have power to annul this contract ----- and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same -----, and the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials."

The allegations of the complaint are that Axman had failed to prosecute the work faithfully and diligently and that Colonel Heuer thereupon annulled the contract and entered into a contract with the North American Dredging Company "to do the work left undone" by Axman, and that the North American Dredging Company carried out the work and completed the contract.

In the Axman contract it was provided that: "The work to be done is to excavate a channel through the shoal to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet; to deposit the spoil as near the south shore as practicable, within lines drawn between Pinole Point and Lone Tree Point, at such places as may be designated by the Engineer officer in charge; and to impound the material behind bulkheads or dykes of suitable construction, subject to approval by the Engineer officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract."

12 In the contract with the North American Dredging Company it was provided that: "The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet; to deposit the spoil in water exceeding 50 feet in depth, lying within the area bounded by lines drawn from The Sisters to Point San Pablo, thence to Marin Islands, and thence back to The Sisters. The top of any pile shall not be higher than 40 feet below the level of low tide."

In the Axman contract the place for the deposit of the material was designated as follows: "The part of the area available for the deposit of material from scows has an average width of about $\frac{3}{4}$ of a mile. Its distance from the site of dredging varies from 1 to 2 miles. The location of the place of deposit, the depths of water therein, and the location of the dredging are shown on maps on file in this office."

In the contract with the North American Dredging Company the place for the deposit of the material is designated as follows: "In place of deposit (b) the deep part of the area for the deposit of material from scows is triangular in shape, covering an area of about 1 square mile. Its distance from the nearest point of the dredging is about 5 statute miles. The location of the places of deposit, the depths of water therein, and the location of the dredging are shown on file in this office."

Evidence was admitted over the objection of the plaintiff in error tending to show that it would cost less to deposit the dredged material at the place designated in the contract with the North American Dredging Company than it would cost to deposit it at the place designated in the Axman contract. It was thereupon contended on the part of the United States that the departure from the Axman contract was immaterial, but it was provided otherwise in the specifications accompanying the Axman contract. It is provided in paragraph

38 that: "Material ----- deposited otherwise than as herein specified, directed, and agreed upon will not be paid for." Colonel

Heuer in his testimony said Mr. Axman was not allowed to
13 deposit material elsewhere than behind the bulkheads. Axman testified that after the place designated for him to deposit the dredged material behind the bulkheads had filled up so that he could only get in at high tide he applied to Colonel Heuer to allow him to deposit the dredged material anywhere else than behind the bulkheads. He also asked permission to be allowed to dump either on the north side of the channel or down at "The Sisters" (the latter place being the place subsequently designated in the contract with the North American Dredging Company for the deposit of the dredged material), but Colonel Heuer refused to allow Axman to deposit the material anywhere else than that specified in the contract. He said to the witness: "I will not allow you to dump any place else, and if you do I will not pay you a cent for anything." Colonel Heuer also testified: "I think the contract specified that he was not to distribute any material above low-water mark. I am not certain about that, but it was my intention anyway that he should not." Axman testified that Colonel Heuer would not permit him to bring the dumped material up too high. He only wanted it up to the low-water mark. Colonel Heuer testified in explanation of this requirement: "I prevented the depositing of the spoil above the low-water mark for the following reasons: The tidal area of San Francisco Bay covers about 480 square miles. The volume of tide between high water and low water, or tidal prism, is what maintains the depth of water on our bar of San Francisco; therefore the Government does not let anybody put anything above low-water mark."

It thus appears from the contract and from this testimony that the depositing of the dredged material at the place designated in the contract was under the express terms of the contract and the requirements of Colonel Heuer, the engineer in charge, an independent and material feature of the contract—so material, indeed, that a failure to comply with its terms would deprive the contractor of all compensation for his work. But it is contended on behalf of the United States that as the contract itself provided that a change might be made in the project during the prosecution of the work, with the consent of the contractor, the same thing might be done by
14 the Government after the annulment of the original contract without the consent of the original contractor. But the contract also provided that: "Such change or modification must be agreed upon in writing by the contracting parties. The agreement setting forth fully the reason for such change and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, That no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred."

No such agreement was ever entered into by the original contracting parties in writing or otherwise, and therefore no provision or agreement for a change or modification of the contract ever went into effect; but this provision of the contract supports the contention of the plaintiff in error that in completing the contract and in doing the work Axman left undone, there could be no departure from the terms of the original contract without such an agreement, and further that the surety could not be held liable unless it also agreed in writing to the change.

It is contended on behalf of the United States that the plaintiff in error was not injured by the change in the project made in the contract with the North American Dredging Company, and that it is, therefore, no ground for complaint. But the plaintiff in error objects that it did not guarantee the contract with the North American Dredging Company under any conditions; that its guarantee was that Axman would perform the conditions of his contract, and in case of failure its liability extended to the completion of the Axman contract and in doing the work he left undone; but it did not agree to become liable for any other contract, or for doing any work other than that left undone by Axman under his contract. A contract similar to the one under consideration was the subject of controversy in the case of the American Surety Co. v. Woods, 15 105 Fed., 741. In that case the contractors abandoned the contract and the work was never completed. The action was to recover of the contractors the difference between the amount the employer would have paid the contractors under the contract for the completion of the work and the amount it would cost the employer to complete the work left undone by the contractors. The Circuit Court of Appeals for the Fifth Circuit stated the question for determination as follows: "The question to be considered is the charge of the court on the measure of damages. The instruction, in effect, was that the measure of damages was the difference between the contract price and what it would have cost to finish the sewers, and that to recover this difference it was not necessary for the sewerage company to complete the work." Referring to a provision of the contract providing that in the event the contractor was delayed or failed to do the work, the employer could take charge of the work and finish it, the court said: "The company is authorized to charge the expense of labor to the contractors. Such cost is to be paid out of the money due to the contractors or to become due by the contract. If the expense of doing the work was less than the sum that would be due and payable under the contract, the contractors were to receive the difference; and, if the expense was greater, the contractors should pay the amount of such excess. It is clear, therefore, that the parties to the work anticipated that the contractors might not finish the work, and provided for the measure of damages on the completion of the work by the sewerage company at a cost greater than the contract price. . . . This provision of the contract can not be ignored in deciding this question. The provision seems to have

been made for the benefit of both parties. It gave to the sewerage company the right and power to take charge of the sewers and finish them on account of the delay or failure of the contractors. On the

16 other hand, it secured to the contractors any sum that might be left of the unpaid contract price after the sewerage company had paid for the completed work. It also fixed and limited their liability for damages on account of their failure to finish the work, so far as this item of damages is concerned, to such excess as the sewerage company would have to pay over the contract price. This clause of the contract, conceding a different rule to prevail in its absence, rescued the case from the uncertain and speculative control of expert witnesses, and applied it to the practical test of actual cost. This secured to the contractors and their surety a valuable right. They should not be deprived of it. From the contract in this case, having due regard to section 19 of it, we do not think it can 'be reasonably supposed' that the parties contemplated that for a failure by the contractors to finish the work they were to be held liable for any outlay which might be required to complete it before the sewerage company was at any expense on that account."

It was accordingly held that the surety was not liable under the contract. So, in this case, the suit is upon the contract which provides the conditions of its fulfillment, and the measure of damages for its nonfulfillment, and if, under its terms, the United States has not completed its contract with Axman and has not completed the work he left undone in a substantial particular, no liabilities have been established against the surety. In *American Bonding & Trust Co. v. Gibson County*, 127 Fed., 671, the Circuit Court of Appeals for the Sixth Circuit had before it a contract for the completing of a courthouse. The contract provided that if the contractor failed in any respect to prosecute the work with promptness and diligence, or failed in the performance of any of the agreements contained in the contract, such failure being certified by the architects, and if the architects further certified that the failure was sufficient ground for the action, the county might terminate the contract and enter upon

17 the premises and take possession for the purpose of completing the work. It was further provided that if the contract was terminated and completed by the county the excess paid by the county to other contractors over the contract price should be paid by the contractors and his surety, and that such expense for finishing the work and any damage incurred thru such default shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties. The architects notified the building committee of the county that the contractors had failed to prosecute the work with promptness and diligence, and certified that the failure, refusal, and neglect was such as to warrant the termination of the contract. Accordingly, after notice, the employment of the contractors was terminated, possession taken, and the building completed by the county. The contractors did all of the work except that covered by the final payment. The action was brought to recover the expense incurred by the county over the contract price in completing

the courthouse, but it was not alleged or proved that the architects had audited and certified the expense for the damage incurred by the county in completing the contract. Notwithstanding the lack of this certificate, the lower court directed a verdict against both the contractors and their surety, the bonding company. In this action the Circuit Court of Appeals held that the lower court was in error, saying: "In instituting this suit, the county planted itself upon the contract and the bond given for its faithful performance. It alleged that in terminating the employment of the contractors it had faithfully observed all the conditions of the contract, and it sought to recover, not only the cost of completing the building, but the per diem damages for delay provided in case of default. The distinction sought to be drawn by the plaintiff, that the suit is not one on the contract, but one for damages on account of the abandonment of the contract, does not appeal to us. This is not a case like the

18 Fuller Company v. Doyle (C. C.), 87 Fed., 687, where the contractor, without doing any substantial work, abandoned his contract, but a case where the contractor, having done all the work except that covered by the last payment, had his employment terminated under article 5 through a strict compliance with its provisions. The damages sought to be recovered here are not damages outside the contract, but damages under the contract, resulting from a violation of its provisions. Accordingly, the surety is also sued. Now, the surety guaranteed the faithful performance of the contract and the measure of the damages for which it can be held responsible must be found in the contract itself. If there be in the contract a provision for ascertaining the amount of damages incurred through a violation of any of its provisions, the surety has a right to insist on its observance before being held responsible. Under the contract, the contractors agreed to construct a building according to certain specifications. The surety guaranteed the faithful performance of the contract. Architects were selected to supervise the work, and the contractors had to present their certificates before receiving any pay. In case the contractors failed to finish the work, the owner might take over the job by complying with certain provisions. But if he did not, he was obliged to complete the work in accordance with the specifications, and before he could collect what it cost beyond the contract price he had to have the certificate of the architects showing the expense and damage incurred. In the case of the International Cement Co. v. Beifeld, 173 Ill., 179, 50 N. E., 716, where a building contract contained a clause identical in terms with that before us, the court held that the certificate of the architect was a condition precedent to the recovery from the contractor of the additional expense incurred in finishing the work. It was urged that the contractor abandoned the contract, but the court overruled the contention,

19 holding that the case was tried upon the theory that the owner was entitled to such damages as were provided for by the contract, not damages outside of the contract."

The recent case of the *United States v. Freel* (186 U. S. 309) is more in point and is authority upon all the questions involved in this case. The action was against the principal and sureties on a contractor's bond, given to secure the performance of contract to construct a dry dock at the Brooklyn Navy Yard. The contract was between the contractor and the Chief of the Bureau of Yards and Docks in the Navy Department. It provided for the construction of a dry dock "to be located at such place on the water line of the navy yard, Brooklyn, N. Y., as shall be designated by the party of the second part." The seventh paragraph of the contract provided (substantially as in the contract before the court) that "if at any time it shall be found advantageous or necessary to make any change, alteration, or modification in the aforesaid plans and specifications, such change, alteration, or modification must be agreed upon in writing by the parties to the contract." It was further provided: "That if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction of the dry dock, that the actual cost thereof shall be ascertained, established, and determined by a board of naval officers to be appointed by the Secretary of the Navy, who shall revise said estimate and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract." It was further provided: "That no change herein provided for shall in any manner affect the validity of this contract." A supplemental contract in writing was entered into between the contractor and the Chief of Yards and Docks, providing that the location of the dry dock should be "One sixty-four (164) feet further inland than laid down and staked out when the said contract was entered into." This supplemental contract provided full compensation to the contractor for the additional work, and it recited that it was under the provisions of and in accordance with article 7 of the original contract, but the surety was not a party to the supplemental contract. The contractor proceeded with the work under the original and supplemental contracts, but so slowly, negligently, and unsatisfactorily that the Secretary of the Navy, under the option and right reserved to him by the said contract, declared the contract forfeited on the part of the contractor, and thereafter, under the provisions of the contract, the Secretary of the Navy proceeded to complete the dry dock and appurtenances in accordance with the contracts, plans, and specifications, at a cost to the United States of the sum of \$370,000.00. The sum of \$72,414.16 represented the damage sustained by the plaintiff in completing the contract. The suit was brought to recover from the contractor and his sureties the damages alleged. The sureties interposed a demurrer on the ground that the plaintiff did not state facts sufficient to constitute a cause of action, and the question was whether a surety on a contractor's bond conditioned for the performance of a contract to construct a dry dock was released by subsequent changes in the work made by the principals without the consent of the surety. It was claimed on behalf of the United

States that the change made in the original contract by the supplemental agreement was within the contemplation of that contract, and must be deemed to have been assented to in advance by the surety. The trial court held that this change was not within the scope of the original contract, but was such a change that exonerated the surety from liability for the subsequent dereliction of his principal. This view of the contract was affirmed by the Supreme Court which, after citing authorities relating to the liabilities of sureties, said: "The proposition that the obligation of a surety does not extend beyond the terms of his undertaking, and that when this undertaking is to assure the performance of an existing contract, if any change is made in the requirements of such contract in matters of
21 substance without his consent, his liability is extinguished, is so elementary that we need not cite the numerous cases in England and in the State and Federal courts establishing it. Many of these cases will be found cited in the opinion of Thomas, J., in this case. (92 Fed. Rep., 299.)"

It will be observed that unlike the case before this court the change in the original contract was made in accordance with the terms of the contract and the change agreed to by the parties to the contract in writing, but like the present case the consent of the surety to the change was not obtained, and it was upon that fact that the surety was held not liable. It will be observed further that the contractor was to be compensated for the additional expense in making the change so that the surety was in no way injured by the change in the contract. The surety was, nevertheless, held discharged from liability. This case is a sufficient answer to the contention of the United States in the present case, that the change in the contract was not material to the plaintiff in error. It is not necessary to review the cases bearing upon this last question. They are numerous, and the law has been authoritatively determined. The surety has the right to stand upon the very terms of his contract. If the conditions of the liability have not accrued under the terms of the contract, the surety is not liable; and if a change is made in the contract without his consent, his liability is at an end, even tho it may appear that the change is for his benefit. The law as declared by the Supreme Court in *Miller v. Stewart* (9 Wheat., 680, 701) is clear and distinct upon this question. It says:

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no further. It is not sufficient that he
22 may sustain no injury by a change in the contract or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal." In *Reese v. United States* (9 Wallace, 13, 21) the same court said: "Any change in the contract on which they are sureties, made by the principal parties

to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

In the present case there was a substantial change in the work required to be done under the original contract. The North American Dredging Company did not, under its contract, complete the Axman contract, and did not do the work he left undone. The surety did not consent to this change, and is therefore not liable for the additional cost arising out of the contract for work done in lieu of that provided for in the Axman contract.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

A true copy.

Attest: April 3, 1912.

[SEAL.]

J. D. MONCKTON,

Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

(Indorsement on cover:) File No. 23180. Supreme Court U. S. October term, 1912. Term No. 628. The United States of America, plff. in error, vs. Rudolph Axman et al. Stipulation and addition to record. Filed Aug. 7, 1912.



In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.
RUDOLPH AXMAN AND AMERICAN BONDING COMPANY OF BALTIMORE.

No. 242.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit. The case has been twice in that court. See *American Bonding Company v. United States*, 167 Fed. 910 (Feb. 1, 1909); *Axman v. United States*, *id.*, 922; and *United States v. Axman et al.*, 193 Fed. 644 (Feb. 20, 1912).

The action was brought in the Circuit Court of the United States for the Northern District of California to recover from one Rudolph Axman

and the American Bonding Company of Baltimore as his surety damages sustained by the United States by reason of Axman's failure to carry out a dredging contract.

By the Rivers and Harbors Act of June 13, 1902, 32 Stat. 331, 346, Congress made provision for "improving San Pablo Bay, California, by constructing a channel between the Straits of Carquines and the Golden Gate, off Point Pinole, Point Wilson, and Lone Tree Point, three hundred feet in width and thirty feet in depth" (R. 49), and on the 21st of November, 1902, Axman entered into the contract in suit (R. 62)¹ with W. H. Heuer, lieutenant colonel, Corps of Engineers, United States Army, representing the United States. It was agreed, in brief, that he would do such dredging as might be required to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet, and that he would deposit the spoil as near the south shore as practicable, within lines drawn between Pinole Point and Lone Tree Point at such places as might be designated by the engineer officer in charge, and impound the material behind bulkheads or dykes of suitable construction, subject to approval by such engineer officer, the same to be built and maintained by the contractor, and that he would excavate a minimum of 100,000 cubic yards per month, prosecute the work with faithful-

¹ The contract also appears in evidence at R. 84.

ness and energy and complete it within 28 months (R. 50-65). The American Bonding Company of Baltimore became his surety in the penalty of \$50,000 (R. 117).

Axman commenced the work within 60 days after the contract was signed and continued to work intermittently until the 24th of December, 1903. During this period he took out at no time the minimum excavation of 100,000 cubic yards per month, and at the end of nine months he had removed less than 200,000 yards out of an estimated total of 2,721,000 yards.

On September 18, 1903, Heuer wrote to Axman complaining of his lack of diligence (R. 137), and Axman answered with numerous excuses and promises of expedition (R. 138). No improvement, however, resulted.

Thereupon Heuer exercised the right given him by the fourth clause of the contract (R. 62) to annul it upon the failure of Axman to prosecute faithfully and diligently the work, and gave to Axman and the Bonding Company on December 24, 1903, written notice to that effect (R. 90-91).

Heuer then proceeded to advertise for bids for the completion of the work. During the life of the contract Axman had complained of the difficulty of depositing spoil in shallow water at the point named in the specifications, and had asked leave to deposit it in deep water at a point known as "The Sisters," which request had been refused.

The first advertisement for reletting contemplated a deposit at the original point, but all the bids which were received under it were in the opinion of Heuer excessive. He thereupon readvertised and invited bids upon the basis of depositing the spoil at the shallow point and also upon the basis of depositing it in deep water at "The Sisters." The latter proved to be the spot preferred by the bidders and led to the lowest bid. The contract was accordingly relet without further change, except as to price, to the North American Dredging Company, which proceeded with the work to completion.

Notwithstanding the more favorable terms as to the place of depositing the spoil, the Government paid \$65,000 more for the actual excavation by the North American Dredging Company under the last-mentioned contract than it would have paid under the Axman contract (R. 123), and sued to recover this loss.

Upon the first trial judgment was rendered in favor of the United States for the difference between the excess cost of completion and the percentages reserved from Axman under his contract; but this was reversed by the Circuit Court of Appeals and the case remanded for a new trial. This was had, and the court below, following as in duty bound the opinion of the Circuit Court of Appeals in the premises, refused to admit in evidence the contract entered into with the North American Dredging Company and the testimony of sundry witnesses to the effect that

the work had been relet at a fair rate, and that the relative cost of performing it was lower, by reason of the change as to the dumping ground, than that of the Axman contract; and, in logical conformity with this ruling, the court instructed the jury to find in favor of the defendants, which was accordingly done and judgment was so entered. This judgment the Circuit Court of Appeals affirmed.

The specifications attached to the original and the relet contracts which give rise to the question here involved are respectively as follows:

Original.—36. The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet; to deposit the spoil as near the south shore as practicable, within lines drawn between Pinole Point and Lone Tree Point, at such places as may be designated by the engineer officer in charge, and to impound the material behind bulkheads or dykes of suitable construction, subject to approval by the engineer officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract. (R. 54.)

Relet.—36. The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet and either

(a) To deposit the spoil as near the south shore as practicable, within lines drawn be-

tween Point Pinole and Lone Tree Point, at such places as may be designated by the Engineer officer in charge; and to impound the material behind bulkheads of suitable construction, subject to approval by the Engineer officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract, or

(b) To deposit the spoil in water exceeding 50 feet in depth, lying within the area bounded by lines drawn from The Sisters to Point San Pablo, thence to Marin Islands, and thence back to The Sisters. The top of any pile shall not be higher than 40 feet below the level of low tide.

Bids will be received for either place of deposit, but will not be considered for any other place of deposit than those specified, and bidders must distinctly state in their bid in which place they propose to deposit the spoil. The right is reserved to award the contract, irrespective of price, for such place of deposit as may be considered most advantageous to the United States. (R. 98.)

ASSIGNMENTS OF ERROR.

It is not necessary to set out *in extenso* the assignments of error. They appear at page 167 of the record and present, in effect, the single question, Did the Government, by extending to the second contractor the right to dump in deep water, release both principal and surety under the original contract?

ARGUMENT.

The principal object of both the original and the second contract was the dredging of the channel described in the act of Congress. This was the thing to be accomplished, and to this the deposit of the spoil was merely incidental.

By the original specifications (sec. 58, R. 59) the right was reserved to the Government to make such changes as might be necessary or expedient to carry out the intent of the contract, and the contract itself (sec. 6, R. 63) made further provision for changes or modifications. If the Government had chosen to accede to Axman's request to permit him to dump in deep water, he of course would not have complained, nor could the Bonding Company, for it had consented in advance to the making of such changes.

The original contract between Axman and Heuer, however, was never changed, nor are Axman and his surety in any sense parties to the second contract. *Quoad* them, the second contract is material only as it fixes fairly or unfairly, in conjunction with the work done under it, the measure of their liability.

After the annulment of the contract by reason of Axman's default it became the duty of the Government to complete the work at reasonable cost and to diminish as far as possible the loss which it had suffered and for which it proposed to hold the defendants liable. The change which was made in

the terms was to the manifest ease of the defendants and lessened the cost of the work as relet without increasing in any particular the burden which either the principal or the surety had assumed.

Where the Government relets a contract, the sureties—and *a fortiori* the principal—are not relieved because there are differences in the terms which diminish the cost of the work as relet.

United States v. McMullen, 222 U. S. 460
(Jan. 9, 1912).

We rely upon this case as controlling and decisive of the case at bar. The similarity of incident and issues is unique. This decision followed in time the first opinion of the Circuit Court of Appeals herein, and it may fairly be assumed that the latter court was as yet unadvised of it at the time of its final action.

CONCLUSION.

The judgment should be reversed and the cause remanded, with directions to grant a new trial.

JOHN W. DAVIS,
Solicitor General.

FEBRUARY, 1914.



In the Supreme Court

OF THE

United States

OCTOBER TERM, 1913

Office Supreme Court, U. S.

FILED

MAR 14 1914

JAMES D. MAHER

CLERK

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

JULIA A. AXMAN, Executrix of the Last Will
and Testament of Rudolph Axman, De-
ceased, and AMERICAN BONDING COMPANY
OF BALTIMORE,

Defendants in Error.

No. 242

In Error to the United States Circuit Court of Appeals
for the Ninth Circuit.

BRIEF FOR DEFENDANT IN ERROR, JULIA A. AXMAN,
EXECUTRIX OF THE LAST WILL AND
TESTAMENT OF RUDOLPH
AXMAN, DECEASED.

AITKEN & AITKEN,
FRANK W. AITKEN
JOHN R. AITKEN,

*Attorneys for Julia A. Axman, Executrix
of the Last Will and Testament of
Rudolph Axman, Deceased.*

FRANK W. AITKEN,
Of Counsel.

Filed this.....day of March, 1914.

JAMES D. MAHER, Clerk.

By.....Deputy Clerk.



INDEX.

	Pages
INTRODUCTION	1 - 5
STATEMENT OF FACTS	6 - 18
ARGUMENT	19 - 75
The action is not for damages, but is on a contract to pay the cost of certain work.....	19 - 24
There can be no recovery except for completing the work	25 - 30
The change made was material; the Government did not proceed to complete the contract, but did other work instead	31 - 39
The contractor's rights after annulment are subject to the same rules as those of a surety.....	39 - 50
The change was detrimental and new obligations were imposed	50 - 54
The contract did not authorize such change unless made by agreement	54 - 62
The McMullen case	62 - 75
CONCLUSION	75 - 76

Table of Cases Cited.

	Pages
<i>Alcatraz Masonic etc. Ass'n. v. U. S. F. and G. Co.</i> , 85	
Pac. 157-8	45
<i>American Bonding Co. v. Gibson County</i> , 127 Fed. 671...	20, 58
<i>American Surety Co. v. Woods</i> , 105 Fed. 741; 45 C. C. A.	
282; 106 Fed. 263.....	29
<i>Arman v. U. S.</i> , Ct. Cl., 28,707.....	9
<i>Burnes Estate v. Fidelity & Deposit Co.</i> , 70 S. W. 518, 96	
Mo. App. 467.....	44
<i>Calvert v. London Dock Co.</i> , 2 Keen 638.....	43
<i>Chesapeake Co. v. Walker</i> , 158 Fed. 850.....	39
<i>Durrell v. Farwell</i> , 88 Tex. 98, 30 S. W. 539.....	46
<i>Holme v. Brunskill</i> (1877), L. R. Q. B. Div. 495.....	43
<i>Prairie etc. Bank v. U. S.</i> , 164 U. S. 227.....	40, 43
<i>Miller v. Stewart, et al.</i> , 6 U. S. 700.....	40
<i>O'Connor v. Bridge Co.</i> , 27 S. W. 251, 983.....	27
<i>Reese v. United States</i> , 9 Wall. 13.....	41
<i>Reissaus v. White</i> , 106 S. W. 607.....	61
<i>State v. Medary, et al.</i> , 17 O. 565.....	41
<i>Taylor v. Johnson</i> , 17 Ga. 521.....	42
<i>U. S. v. Corwine</i> , 1 Bond 339; Fed. Cases 14,871.....	49
<i>U. S. v. Freel</i> , 92 Fed. at 306-307	48
<i>U. S. v. Freel</i> , 186 U. S. 309.....	49
<i>U. S. v. Freel</i> , 186 U. S. 309.....	46

In addition to the above cases, we desire to call the Court's attention particularly to the decision of the Circuit Court of Appeals on the first writs of error herein where the questions are fully discussed and the authorities carefully considered:

American Bonding Co. vs. U. S., 167 Fed., 910.

The opinion is set out in full at the end of the record herein.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1913

UNITED STATES OF AMERICA,

Plaintiff in Error,

VS.

JULIA A. AXMAN, Executrix of the Last Will
and Testament of Rudolph Axman, De-
ceased, and AMERICAN BONDING COMPANY
OF BALTIMORE,

Defendants in Error.

No. 242

In Error to the United States Circuit Court of Appeals
for the Ninth Circuit.

BRIEF FOR DEFENDANT IN ERROR, JULIA A. AXMAN,
EXECUTRIX OF THE LAST WILL AND
TESTAMENT OF RUDOLPH
AXMAN, DECEASED.

Introduction.

The brief filed for the United States (received as
this brief goes to print) relies on one case,

U. S. v. McMullen, 222 U. S. 460,

concerning which it says, "the similarity of incident and issue is unique".

We might well rest our argument also on this one case, which is so like and so *unlike* the case at bar that it illustrates defendant's position perfectly and points the argument against the Government's contentions with most unusual accuracy.

The McMullen case was decided, expressly, upon the presence of those elements and circumstances that are lacking here, and the absence of those which appear in case at bar. There is indeed a similarity of circumstances, in that both arose on dredging contracts with the United States, and that the words "place of deposit" appear in each record; but on every essential feature there is an absolute *contrast*, not similarity, between the two.

We will consider the *McMullen* case more fully elsewhere in this brief. It suffices at this point to say that the contractor there undertook to deposit the spoil either on shore or in deep water, at the option of the United States, and without difference of price; that the work was wholly abandoned and the contract breached and liability for general damages incurred, the right to recover which the annulment specifically reserved; that the United States took charge a year and a half *after* the time for completion; that the relet contract was on the same specifications—repeated word for word—as the first, and was expressly a continuation thereof, and

that all the work done under it was included in the original contract. In the present case, however, it appears that Axman undertook to deposit the spoil on land and impound it, and not only was not required or allowed but could not have been asked to deposit in deep water, as the contract could not be changed without his consent; that the contract was *annulled* shortly after he commenced work and while he was actively at work; that no liability for damages arose—merely a liability under the provisions of the annulment clause, to pay the cost of “completing the contract”; that the second contract included work not included in his contract at all.

The *McMullen* case was an action for damages and decides these propositions (apart from the matter of extension of time which was the main point argued in that case but is not involved here): that when a liability for damages has accrued through breach of the contract the giving of a notice of annulment which reserves all rights to recover damages does not affect the Government's right to recover on that liability; that the change in method of deposit was immaterial as the Government had “reserved an absolute right of choice in this regard” and that the failure to attain the *object* of the contract (i.e., its *general* purpose) was immaterial “so long as the work done towards it was work that the first contractor had agreed to perform.” It is obvious that the reasoning of that case sustains the contentions on behalf of the contractor in this.

Apart from the citation of the McMullen case, the argument of the brief is simply that the "principal object" of the contract was the dredging of the channel, and that the deposit of the spoil was "merely incidental"; that the Government reserved the right to make changes; that the change was for the benefit of the defendants and lessened the cost of the work.

The contract shows, however, that the provisions as to *the place of deposit of spoil* are not incidental, but are so material as to be absolutely essential. It shows also that instead of the government reserving the right to make changes, it expressly provided that no changes that might either increase or decrease the cost could be made without Axman's consent. Finally, the second contract, instead of being "manifestly to the ease of the contractor", introduces new obligations and contemplates other and different work *not included in the original contract at all*, and for which he never in any way agreed to pay; even if it were otherwise, the new contract nevertheless would not afford any basis for a liability against him, as it is not a compliance with the contract provision which alone was to give rise to such liability, and which the parties agreed would be the sole measure thereof.

It is also suggested in the brief that as Axman had requested that he be allowed to deposit the spoil in deep water, this would have constituted a consent to such a change *if* the request had been granted.

But his request was *not* granted; and it was only that *he* be allowed to so deposit the spoil, at *that* price, not that someone else with a different kind of plant do it at some other price. Under the contract his consent, the reasons for the change, and the price, had to be in writing, and there is nothing to show that he would have agreed to the change even at an increased price if any plant but his own was to be used and he nevertheless held liable for the cost. For the same reason his request for such permission does not at all indicate, (as may be argued), that the method followed under the second contract was in fact as cheap as that prescribed in his own contract. The record sufficiently shows that while his plant was well adapted to the deep water method the requirements imposed by Colonel Heuer as to the placing of the bulkheads and impounding put him to great and unexpected expense and delay, for the very reason, as Colonel Heuer stated (R. 148), that his boats drew too much water. But the fact that Axman himself was so situated as to prefer one method to the other does not at all imply that the other bidders were in the same position.

On the other hand the fact that Axman offered to do at 11.48 cents per cubic yard the very work for which the Dredging Company received 14.48 cents should certainly preclude the United States from claiming, as against him, that the latter rate was a reasonable one, or a necessary expenditure, and from requiring him to pay \$65,000 for work which he was refused permission to do for nothing.

Statement of Facts.

The statement of facts in the United States' brief is substantially accurate, except in saying that the action was brought "to recover from one Rudolf Axman and the American Bonding Company of Baltimore, as his surety, *damages* sustained by the United States by reason of Axman's failure to carry out a dredging contract".

As we understand the action, it is not for damages at all; neither can it be said that Axman failed to carry out his contract. The contract was "annulled" long before the time for completion, and the action was brought to recover the amount which the United States claims it expended in doing "the work left undone by Axman", under the contract provision that in case of annulment the Government should proceed to complete the contract at Axman's expense.

In short, the action is *on the contract*—on Axman's agreement to pay for certain work—and is *not at all* an action for any damages arising from a failure to dredge. The importance of the distinction is seen in the argument that as to Axman and his surety, "the second contract is material only as it fixes, fairly or unfairly, in conjunction with the work done under it, the measure of their liability" (p. 7). The question is not as to the fairness of any "measure" of damages or liability, but whether or not the Government has complied with the contract pro-

vision and has done *the work* for which Axman agreed he would pay, or has done some other work for which he did not agree to pay. The defendant's position, sustained by the Circuit Court of Appeals, is simply that the money paid by the Government on the second contract was for doing different work, for which Axman and his surety cannot properly be charged. The only question as to the "measure" of liability is as to whether any measure other than that prescribed by the contract can be resorted to. As the contract definitely prescribes the cost of completion as the only measure of liability the question of whether some other measure of liability would be fair cannot arise. In fact, however, the "second contract" was manifestly unfair as a means of measuring Axman's liability.

The action is not an action for damages sustained "by reason of Axman's failure to carry out a dredging contract" for the *further reason* that no such "failure to carry out" was involved in the case. The engineer officer in charge gave the notice of annulment "for failure to comply with the specifications" (R. 91) while Axman was actively at work striving earnestly to overcome the difficulties with which he had unexpectedly been confronted, and attempting to perform the contract, and when he still had nineteen months ahead within which to carry out the contract. Instead of being based on failure to carry out the contract, therefore, the case is strictly one of annulment—of the United States having elected to terminate the contract while still partly executory, and to take the work into its own

hands from that time forward. Under such circumstances there could have been no liability for damage unless because of delays; there could be no liability for damage for non-performance. No damage or injury through delay is suggested. Nor is there any suggestion—or basis for any suggestion—that Axman failed to carry out the contract, unless in the one respect given by the engineer as his reason for annulling it: that he had failed to comply with the requirements of the *specifications* as to *average yardage* per month. Whether *such* failure to comply with the specifications justified an annulment (the contract providing other means of expediting the work and contemplating annulment only in case of bad faith), is a very serious question, but one which is not before the court at this time. The same is true as to the showing of Colonel Heuer's animus toward the contractor. But while these questions are not directly involved here, it is to be noted that the annulment was in fact based only on such failure to make the specified yardage, and that this in turn resulted not from any unwillingness or bad faith on the part of the contractor, but from acts beyond his control—firstly, unexpected and unusual storms, and secondly obstacles placed in his way by the engineer officer in charge by an interpretation of the contract and an exercise of his discretion which would seem to show such prejudice as to imply bad faith on the part of the engineer himself—such prejudice as that of which another court expressly said *implies* bad faith (in a *finding* which nevertheless passes on the *law*):

“Colonel Heuer, the engineer officer in charge of the work, manifested toward the claimant from its beginning to its close a feeling of intense dislike and prejudice, and at times treated him with extreme discourtesy and unreasonableness. * * * He endeavored to have the contract annulled for failure to furnish the bond provided therein as promptly as he thought it should have been done, and he made a similar attempt subsequent to the explosion of Arch Rock by the claimant. *His construction of the contract and specifications was uniformly technical in the extreme*; he declined to grant reasonable and courteous interviews and dismissed polite appeals with harsh and profane language. His exactions under the contract and his rulings in respect thereto were *so erroneous and unjust as to imply bad faith.*”

Azman v. U. S., Ct. Claims, 28,707, Feb. 12, 1912, May 27, 1912.

On the evidence here of the same things—discourtesy and unreasonableness—technical constructions, and harsh and profane treatment (R. 127, 149)—all which likewise “imply bad faith”, the jury, had it passed on the evidence, must have found that the annulment was the result of malice and prejudice. But even though the verdict for defendants was *directed* by the court, we submit that in the absence of a verdict for plaintiff and the presumptions arising to support it, the decision and actions of the engineer shown on this record (R. 125-133) and the annulment so determined on, *do not constitute any evidence whatever that the contractor was guilty of the slightest bad faith or of any breach of the contract.* The only fact shown is the bare fact of

annulment. While, as already stated, the question of the engineer's state of mind, and of whether the annulment was proper, are not before the court as such, the fact that this is not a case of bad faith or breach or abandonment on the part of the contractor, but essentially an action to enforce the drastic remedy of annulment, is all-important.

The very letter referred to in the United States' brief as containing "numerous excuses and promises of expedition" indicates, (and the record elsewhere shows) Axman's sincere efforts to overcome the unforeseen obstacles—that he had assembled a plant costing \$175,000, the largest and best on the Pacific Coast; that the water in the designated dumping ground was so shallow that it was impossible to get within it except during the comparatively short periods of high water; that he had to charter a suction dredger at \$8000 a month (R. 130) to dig a basin therein and a channel leading to it "so that he might get his barges in behind the bulkhead," to quote Colonel Heuer's words (R. 115), although the proposal for bids stated that the place "*available for the deposit of material from scows*" had a width of from half to three-quarters of a mile (R. 78).

We mention these matters at this time only to point out that this is not the ordinary case of a contractor abandoning the work or failing or refusing to perform, but that the delay, which *alone* is complained of, was occasioned by an interpretation of the contract by the engineer officer in charge, which was at least unexpected and unforeseen by the con-

tractor, and with which he was nevertheless earnestly attempting to comply, when the Government at the instance of the engineer officer arbitrarily exercised the option of taking the work out of his hands. In the one class of cases the Government properly recovers general damages; *in the other it must recover under whatever special remedies the contract reserves to it after annulment and not otherwise.*

Axman's contract was to do such dredging in San Pablo Bay as might be required by Colonel W. H. Heuer, (the engineer officer in charge), in accordance with the specifications attached (R. 85). The specifications were made part of the contract (R. 75, 84). Axman was to have sixty days from date of approval, to begin work, and twenty-eight months thereafter to complete it; the notice of approval was given January 3, 1903, which made his completion date July 4, 1905. Among other things the contract provided substantially as follows:

In paragraph four (R. 85) that if the contractor should

"in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract"

the contract could be "annulled", whereupon all money or reserve percentage would be retained

"until the final completion and acceptance of the work herein stipulated to be done",

and that the United States should have the right "to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid", etc., and that upon the giving of such notice the party of the first part "shall be authorized to proceed to secure *the performance of the work* or delivery of the materials by contract or otherwise in accordance with law" (R. 85).

In paragraph 5 (R. 86) that if the contractor did not complete the work within the time agreed on, the time limit could be waived and completion within a reasonable time allowed.

In paragraph 6 (R. 86),

"If at any time during the prosecution of the work it be found advantageous or necessary to make *any change or modification* in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether for labor or material, as would *either increase or diminish the cost* of the work, then such change or modification *must be agreed upon in writing by the contracting parties*, the agreement setting forth fully the reason for such change and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War; Provided, that no payment shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred".

The specifications contained the following provisions in substance:

In paragraph 31 (R. 76) that the contractor would be required to prosecute the work "with faithfulness and energy," and to complete it within twenty-eight months from commencement.

In paragraph 32 (R. 76), that "unless extraordinary and unforeseeable conditions supervene" the time allowed is considered to be sufficient; that if the work is not completed within the time stipulated the time limit may be waived and completion within a reasonable time allowed, the contractor being charged with cost of additional superintendence, etc., which might be remitted as to time lost through "abnormal force or violence of the elements" etc., or "other unforeseeable cause of delay arising through no fault of the contractor".

In paragraph 36 (R. 77), that "the work to be done is to excavate a channel, etc., to deposit the spoil, etc., and to impound the material behind bulkheads or dykes", etc.

In paragraph 38 (R. 78), that material dredged outside the designated lines "or deposited otherwise than as herein specified, directed and agreed upon, will not be paid for".

In paragraph 39 (R. 78), that "all dredged material is to be deposited within the limits of the area described in paragraph 36".

In paragraph 40 (R. 78), that "the part of the area available for the deposit of material from scows has an average width of three-quarters of a mile".

In paragraph 41 (R. 78), that "all material dredged and not disposed of as directed" "or any unauthorized dumpage", must be properly disposed of when required.

In paragraph 45 (R. 79), that payments would be made monthly, "provided a satisfactory rate of progress as described in paragraph 46" has been made.

In paragraph 46 (R. 79), that "the work must progress at the rate of at least 100,000 cubic yards per month, and to entitle the contractor to the monthly payment, etc., an *average* of not less than 100,000 cubic yards per month must have been dredged *and deposited*", etc.

In paragraph 47 (R. 79), that if the plant be deemed insufficient or inadequate "the contractor will be required to increase or change the plant to the extent found necessary".

In paragraph 48 (R. 80), that if it be found "that the required minimum rate of progress is not being maintained, the engineer officer in charge shall have the power" (after notice), "to employ such additional plant" as may be necessary to insure completion in time, at the expense of the contractor, also that the provision should not affect the right to annul "as provided for in the form of contract to be entered into".

In paragraph 50 (R. 80), "that all material will be paid for by the cubic yard *measured in place*".

In paragraph 58 (R. 81), that the right is reserved to make "such *minor* changes in these speci-

fications as may be necessary or expedient to carry out the interest of the contract", and that no increase in price shall be paid to the contractor for such changes "except as provided in the form of contract to be entered into".

Under this contract Colonel Heuer had certain discretionary powers with reference to the place of deposit. He (through an assistant) designated a place for the bulkhead which he said was "very near" the end of Point Pinole, (R. 114), and which Axman said was eight hundred feet inshore (R. 124). The result, according to Mr. Axman, was that instead of the place available for the deposit of material being from half to three-quarters of a mile wide it was not over 600 feet wide (R. 125); that the water was nowhere over four feet deep and only of that depth in a small area (R. 126), and his barges or scows would only reach the prescribed dumping ground near the time of high tides (R. 126, 129). To meet this condition he ordered special shallow draft barges built to get in behind the bulkhead at low water (R. 127). He requested permission to dump the material outside the bulkhead and lift it over with an additional dredger; it was refused (R. 126). He employed a suction dredger to dredge a channel so he could get his barges into the place of deposit (R. 130), but discontinued because the engineer officer would not allow the material to be spread above low water mark (R. 127). In

addition to these unforeseeable obstacles the weather conditions were unusually adverse (R. 129); also, he met with great delays in his efforts to "create additional appliances" to meet the new conditions (R. 139). For these reasons he did not make rapid progress during the first few months. Meanwhile, he requested permission to deposit the material on the north shore of the bay instead of the south; also, to take it to San Francisco and use it to fill in certain waterfront property there (R. 129, 133); also, to dump in deep water at "The Sisters" under his contract and at *the same price* (R. 126, 127). All these requests were refused. December 24, 1903, Colonel Heuer gave him notice that the contract was annulled "on account of failure to comply with the requirements of the specifications" (R. 91). At the time he still had over a year and a half within which to complete the work.

After the annulment Colonel Heuer advertised for bids under the same specifications, and rejected all the bids received (R. 92). He then advertised for bids covering the alternative methods of disposing of the spoil, and thereafter let a contract to the North American Dredging Company which obligated that company to transport the material five miles down the bay (R. 99), and there deposit it in such manner that the top of no pile should be within forty feet of the level of low tide (R. 99). The advertisement reserved to the Government the right to award the

contract "*irrespective of price*", for "such place of deposit as may be considered most advantageous to the United States" (R. 98) *and there is not a word in the record to indicate whether or not a lower bid was received (among the final set submitted) to do the work and deposit the spoil on the shore (under 36a) at a lower price than that made by the Dredging Company for doing it in accordance with 36b*). The testimony is that the price at which the contract was let was "the lowest price at which any contractor offered to do that work for the Government *in accordance with the provisions of that particular contract*" (R. 114). But "the provisions of that particular contract" called for depositing the spoil in deep water, and there is nothing whatever to show what bids were received for the other method of deposit. As the United States expressly reserved the right to award the contract for one method or the other regardless of price, there is no basis for any presumption that the method chosen was cheaper than that rejected.

Upon the completion of its contract by the Dredging Company this action was commenced to recover the excess cost from Axman under the contract provision giving the United States the right to recover the cost of completing his contract. The complaint alleged in general terms Axman's agreement to do the work at the agreed price and set out in

haec verba the provisions of paragraph 6 as to annulment and the recovery of the cost of completion.

The other essential allegations of the complaint were that Axman abandoned the work and refused to do the work, and failed to prosecute it "faithfully and diligently, *or at all*" (R. 6); that the engineer therefore annulled the contract (R. 7) and a contract "to do the work left undone" was let to the North American Dredging Company (R. 7), which "carried out the work and completed the contract" (R. 7).

No evidence whatever was introduced in support of the allegation of abandonment, etc., the case as presented being based wholly on the annulment. The wording of the notice showed that the annulment was "for failure to comply with the requirements of the specifications" (R. 91), and Colonel Heuer frankly stated his reasons in his testimony:

"The opinion that I arrived at was that he was not carrying out his contract. His contract required at least 100,000 cubic yards a month of excavation" (R. 90).

On the first trial the court admitted the contract with the North American Dredging Company and instructed the jury that the difference as to the work to be done did not constitute a defense—practically directing a verdict for the Government. On the second trial the contract was excluded, as not showing a compliance with the requirement of the Axman contract that the Government complete *the work*; the proffered testimony of expert witnesses

that the work as done cost less, in their opinion, than the work under the alternative specifications *would* have cost, was excluded, and a motion for non-suit was granted. Although the testimony offered was tentatively received, the objection was afterward sustained and the evidence offered is not properly a part of the record. There was no cross-examination or rebuttal of those witnesses as defendants relied on their objection which the court was bound to sustain—and did sustain—in view of the decision of the Circuit Court of Appeals following the first trial. Essentially, then, the record shows:

The United States sues to recover the cost of completing a certain contract, such recovery being the measure of liability provided by the agreement. It offers in evidence a contract to do work which is not “the work to be done” under the first contract, but includes other, new, work. The evidence is excluded and a non-suit granted. The sole question, therefore, is whether the contractor and his surety are liable, under the agreement to pay the cost of completing his contract, for the money expended under the second contract.

Argument.

**THE ACTION IS NOT FOR DAMAGES, BUT IS ON A CONTRACT
TO PAY THE COST OF CERTAIN WORK.**

This is not an action for damages, but an action to recover under the contract provision that Axman

would pay certain amounts under certain circumstances.

It is held that a plaintiff in such an action as this, based on annulment, can only recover under the contract:

“In instituting the suit, the county planted itself upon the contract, and upon the bond given for its faithful performance. * * *

“The distinction sought to be drawn by the plaintiff, that the suit is not one on the contract, but for damages on account of the abandonment of the contract, does not appeal to us. This is not a case like *Fuller Co. v. Doyle*, 87 Fed. 687, where the contractor * * * *abandoned* the contract, but a case where the contractor * * * had his employment *terminated* under article 5 through a strict compliance with its provisions. The damages sought to be recovered here are not damages outside the contract, but damages *under the contract*, resulting from a violation of its provisions.”

American Bonding Co. v. Gibson Co., 127 Fed. 671.

The action is on the contract provision for the recovery of an amount agreed to be paid to the Government for “completing the contract”. If Axman had abandoned the work or had failed to perform it within the time agreed, a right to damages would have arisen, and perhaps the cost of something substantially the same might have been a fair test. But where the work is taken out of the contractor’s hands while he is carrying it on, no such right arises; and the Government,

proceeding under such a stipulation, is confined strictly to the remedies it gives.

In a recent case in this court it is directly held that the provision for annulment does not give rise to any general right to damages, and that the Government, under such a provision, can recover only what is expressly allowed it by the contract. In that case, there being a provision only for retaining the reserved percentages, it was held that the Government could not recover anything beyond their amount. So here, as the Government reserves only the right to recover the cost of completing the contract, it is not entitled, on annulment, to recover general damages for whatever injury it would have sustained if the contractor had abandoned the work.

U. S. v. O'Brien, 220 U. S. 321.

The above case is strikingly like the present case in the question presented, although there is a marked contrast on the facts. It arose on a dredging contract which contained the same provision as the Axman contract that if the contractors should, "in the judgment of the engineer officer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of the contract", it might be annulled; and, in addition, the provision (not in the Axman contract) that thereupon all reserved percentages should be forfeited to the United States; it did not have the provision on which the present action arises, that on

annulment the United States could complete the work at the contractor's expense. (The Axman contract provides that the reserved percentages shall be *retained* until completion, not that they will be forfeited.) In addition the contract in the O'Brien case contained the further provision, however, that "in case of *failure* on the part of the parties of the second part *to complete this contract* as specified and agreed upon", the United States should have the right to recover from the contractor "whatever sums may be expended by the party of the first part in completing the said contract" in excess of the contract price—the very provision which the Axman contract reserved in case of *annulment*.

In the O'Brien case, as here, the engineer became dissatisfied with the rate of progress. A notice of annulment was given, as in the case at bar, long prior to the completion date. The work was completed by another contractor at increased cost. The action was to recover the sums expended in so completing the work, after annulment; the only question was whether the contract provisions imposed any liability therefor. It was held that the failure to comply with the specifications as to rate of progress, while ground for annulment, did not constitute a breach, or a failure, under the provision as to "failure to complete this contract as specified and agreed upon" so as to make the contractors liable under that provision for the cost of completion, but that the only remedy on annulment was that expressly reserved—the forfeiture of the reserved percentages.

In the course of the decision the court said, as to the rate of progress:

"The sole material express promise of the contractors was to complete the work by July 1, 1902. If the work was done at that date, that promise was performed, no matter how irregularly or with what delays in the earlier months. Under its terms the United States was not concerned with the stages of performance, but only with the completed result" (327).

That the United States is only concerned with the completed result is obviously equally true under the Axman contract, in view of the fact that the provisions as to rate of progress are plainly intended to control only the right to receive payment and contemplate that the contractor shall maintain the prescribed rate not month by month, but only as an average rate. The decision says further:

"It would be a very harsh measure to pronounce the contract broken when, but for the prohibition of the United States, the defendants might have done the work in time. The right to terminate the employment of the defendants, coupled with a provision for monthly payments based upon the amount of material removed, and therefore, of course, giving little pay for little work, is the protection expressly stipulated by the United States" (327).

Further, that the paragraph giving the right to recover the excess cost of completing the work

"gives that right only 'in case of failure to complete this contract as specified and agreed upon.' On their face these words mean failure to complete by July 1, 1902; not failure to complete because turned off by the engineer in

charge a year and six months before that time arrived, when competent persons still might do the job" (327-328),

which is equally applicable here as to the question of whether Axman failed to complete the contract, as alleged, and whether he ever became liable for damages for breach. The opinion continues (referring to such liability for excess cost):

"The earlier clause under which the so-called annulment took place provides for no such consequence, but only for a forfeiture of reserved percentages and money due" (328),

and concludes (after discussion of other matter):

"The suit is upon the contract, but the United States asks more than, in our opinion, the contract gives" (328),

which we contend is exactly the case here. Just as the O'Brien contract provided for only forfeiture of reserved percentages, and could not be construed to impose liability for excess cost, in case of annulment, so the Axman contract, providing for the recovery of "the cost of completing the work", cannot be considered as imposing liability for general damages, or for any cost, estimated or actual, except the cost of "the work".

The case seems to us to be a conclusive authority on the propositions that annulment by the engineer before the completion time does not show a breach or failure of performance by the contractor; that an action based on such annulment is an action on the contract, and not for damages; and that on annul-

ment no rights or liabilities arise except such as are expressly provided.

If the failure to maintain the specified average yardage be considered a *breach* of the contract, it is nevertheless a *non-essential* breach, and not of any importance on the issue and record here. The liability arising from such breach would, in general, be only for such damages as resulted from the delay. If, for instance, because of such delay the United States was unable to send a battleship through the channel to Mare Island, and had to send it to Puget Sound, the increased expense would provide a measure of damages; but even this could arise only in case of delay extending beyond the time of completion—in other words, failure to perform the essential agreement to complete within the time allowed. It would be very difficult to determine what damage could possibly be sustained by failure to complete, in a given month, the one-twenty-eighth part of the work to be done on an unfinished unusable channel. As stated in the *O'Brien* case, final completion within the time is the important matter; and for that reason the Axman contract provided against serious delays by giving the Government full control over the rate of progress, with the right to expedite it by the employment of additional men and plant if necessary (Sp. 47, 48; R. 79), and even to take the work over and complete it if the contractor did not proceed faithfully and diligently (Sp. 48, R. 80; Contract 4, R. 85). These specific remedies would seem to replace and exclude the very uncertain remedy of recovering damages for delay.

Mere delay during the progress of the work, even if regarded as a breach of the provision as to average yardage, would not in itself be considered such essential or total breach as would make the contractor liable for general damages measureable by either the reasonable or actual cost of completion. *Even the annulment clause does not make the specified yardage essential*; the essential elements

under it are good faith and diligence. And even when they are lacking the liability is for actual cost of completion, not estimated damages.

The clear intent of all the provisions is that the United States will be enabled to *prevent* damage accruing and to guard against the usual uncertainties of claims for unliquidated damages for failure to perform.

The contract does not anywhere reserve any right to recover general damages, even in case of abandonment or repudiation. The evident intent is that the annulment clause is to be the Government's preferred and only remedy in case of any breach however serious; that in any case—certainly in such a case as this—the United States would seek its remedy not in a suit for general damages, but in completing the contract and recovering the cost. This provision substituted certainty for uncertainty, and the expense of actual completion for experts' estimates of probabilities; and the contractor as well as the Government is entitled to its protection.

In short, even if non-compliance with the provision as to average yardage was a breach of the contract, there was no liability for general damages, but at most a liability only for such damage as might have been sustained through the delay, if indeed it was not the intent of the parties that the right of expediting the work would replace the right even to such damages. **But no such damage was claimed or attempted to be proved, the only contention and issue being that the United States had exercised the right to complete the work under the annulment clause, and had completed the work left undone, as required by that provision.**

It may be added that if the contractor had in fact **violated some most essential provision**, and if the contract left him under a general liability to **pay damages**, they could not properly be fixed or based on **changed work and estimates**, in view of the contract provision that **all changes must be agreed to by him in a writing setting forth the change and the price thereof.**

~~ment no rights or liabilities arise except such as are expressly provided.~~

**THERE CAN BE NO RECOVERY EXCEPT FOR COMPLETING
THE WORK.**

Essentially, this action is based on the proposition that Axman agreed that he would pay to the Government whatever it expended in "completing his contract". Everything else in the case is incidental to this. The Government is now seeking to enforce this liability only—a liability to pay it the agreed compensation for the work agreed on.

In a sense, the United States is in the same position as any other person who makes a contract to do certain work and then seeks to enforce payment; the question that arises is whether *the work agreed on* has been done. The case is fundamentally the same as if the action were brought on an independent contract whereby Axman agreed with the Government that if the latter would complete his contract (identifying it by date, etc.), he would pay it all amounts actually expended in so doing; could the Government under such a contract do some other work instead and recover *on the contract*? Yet this action is brought on the contract—on the agreement set forth in the complaint, that Axman would pay the amount expended. The fact that the Government was one of the parties to the original agreement, whereby

it agreed to pay Axman for certain work, is immaterial. So far as this special covenant of Axman's is concerned—the agreement on his part to pay the Government for completing the work—the Government is in the same position as any contractor would be who undertook to complete the work required by the original agreement.

It is perfectly clear that any third party who made such an agreement with Axman could not recover on the contract by doing the work which was done by the Dredging Company. No doctrine of substantial performance, however loose, would allow recovery on such a contract, in the face of the provision that "material deposited otherwise than as herein specified will not be paid for" (R. 144). No contention that the substituted performance was as cheap would avail in such an action on the contract. In an action on the contract such contractor would be in the position of a builder who had built a house which was perhaps good and perhaps cheap, but was certainly not the house agreed on. There could be no recovery on the contract. There is of course no question, in this case, of any recovery on quantum meruit, or on any implied agreement, nor is there any question of general damages. The action is founded expressly on Axman's special agreement to pay; and no cause of action could arise, *through the annulment*, except upon that agreement.

The case does not involve damages in any way, but only the question of performance of contract

obligations. Axman did not agree to pay to the Government whatever damage it might sustain if the contract was annulled. He did not agree to pay such amount as might be equal to the *probable* or *estimated* cost of completing his work. He did not agree to pay the cost of *similar* work. His agreement was, specifically, to pay "whatever sums may be expended" in "completing the said contract".

No claim is made here for any damages except the excess cost of completion after annulment. No suggestion was made (and there is no basis for any) of any failure to comply with the contract, except in not making the specified average yardage. No damages could arise from that, as under the contract the Government retained all earned payments and had the right to put on additional plant, etc., and so avoid any damages (Spec. 47 and 48; R. 79-80).

Such a provision for annulment shows that damages were not to be recovered in case the contract was annulled.

"The remedy provided for the company in case of non-compliance with the contract by the contractors, and manifestly the only remedy contemplated by the parties, was the right to annul the contract in either one of the three conditions stated therein, and in one of them to have the unpaid part of the earnings forfeited."

O'Connor v. Bridge Co., 27 S. W. 251, 983.

The contract as a whole shows clearly that in case of annulment no damages, as such, were to be recoverable, but that in that event, the United States should be limited to the recovery of the amount expended in completing the contract. And in this action, as said before, the Government "plants itself on the contract", and must recover on the contract or not at all.

A case involving the precise question presented here—and, we contend, decisive of it—was before the Circuit Court of Appeals in 1901: *American Surety Company v. Woods*, 105 Fed. 741, 45 C. C. A. 282, 106 Fed. 263.

There, as here, a contract had been annulled under a provision allowing the employer to take charge and complete the work. It was held that such provision limited the manner in which the damages could be ascertained, and that a recovery could not be had unless the employer had in fact completed the work; that he could not recover general damages but must proceed under the contract provision.

We quote from the syllabus:

"A contract for the doing of certain work, which provides that in case of delay in doing the work the employer may take charge thereof, and *complete it at the cost of the contractor*, not only provides the measure of damages for the breach of the contract by the contractor if he shall fail to complete the work, but also the manner in which the amount of such damages shall be ascertained; * * * on the

failure of the contractor to complete the work, without fraud or bad faith, the employer *cannot recover as damages* for breach of the contract the difference between the contract price and the cost of completing the work, as estimated by experts, where it abandoned the work, and in fact *expended no money on its completion.*"

American Surety Co. of N. Y. v. Woods,
105 F. 741; 45 C. C. A. 282; 106 F. 263.

In the present case, as in the Woods case, plaintiff attempts to recover on a showing of what the work which should have been done, *would have cost* if it had been done.

The Government has not contended that the work done under the Dredging Company contract was substantially *the same* as the work included in the Axman contract, but introduced testimony tending to show the comparative cost of the work under the two contracts. On its own showing the requirements of the two contracts were different, but it was contended that it would have cost at least as much to complete the Axman contract as it did to do what was done under the Dredging Company contract.

There is nothing more or less than an attempt to show, *by the estimates of experts*, what it *would* have cost to complete the Axman contract. It is squarely within the rule laid down by the Circuit Court of Appeals in the Woods case that such estimate cannot be made the basis of recovery.

Mr. Axman's contract was not to pay the reasonable value of the uncompleted work, but to reimburse the Government for its *expenditures* in doing that very work. We contend that the work was not done and that Axman and his surety cannot be held liable for the expense of doing *other* work, or for the *estimated* expense which would have been incurred *if* the Government had done the work agreed on.

If the work done by the Dredging Company is not within the terms of Axman's agreement there can be no recovery for the cost of doing it. The contract is that the Government may "proceed to secure the performance of the work" and recover from Axman the extra cost of completing the contract; but the contract gives it no right to recover for work materially different.

The position of this defendant in error, in short, is that as the Government did not complete the Axman contract, but did some other work instead, it cannot recover. We contend that Mr. Axman was entitled to insist on the strict performance of the agreement sued on—the agreement that the work specified in the first contract should be completed. We contend that the work actually done was not the work contemplated, but materially different, and included work not contemplated at all.

The correctness of defendant's contention was recognized, apparently, when the complaint was drawn, as in it the United States alleged the completion of the work—"the work left undone," to quote from the complaint itself. On the trial this position was virtually abandoned by the offer of testimony intended to show that the work actually done under the second contract was cheaper; not that it was the same.

But while the evidence offered was doubtless intended to show that completing the Axman contract would have cost at least as much as the work actually done, it in fact was not pertinent even to that question.

The evidence offered did not offer any basis for estimating the cost of completing the Axman contract. *No one of the witnesses was asked about the cost of completing that contract, or doing the work left undone under it.* Axman had constructed 2,400 feet of bulkhead. Even if the witnesses knew of this they could not take it into account in their answers. They were asked only as to the cost of doing the work under specifications that did not give them any right to use it, but expressly required bulkheads *to be built* by the contractor (R. 98, par. 36a) at points designated, which might be miles from Axman's bulkhead. Each of them testified expressly with reference to doing the work *in the manner specified*.

Any testimony as to comparative cost seems immaterial as *the only issue* was whether *the work was the same*; see allegations that the United States contracted for the doing of "*the work left undone*" (R. p. 4), that the second contractor "*carried out the work and completed the contract*" (R. p. 4), and that the cost of doing "*the same work*" (R. p. 5), under the second contract was more than it would have been at the price Axman set. Evidence that work is *cheaper* does not show that it is *the same*. The gist of the complaint is that the same work was done; the proffered testimony, however, was not that it was done at a certain cost, but what it *would* have cost *if* it had been done,—a matter *not in any way within the issue*.

In short, the evidence offered at the trial did not tend to show what the cost of completing the Axman contract would have been; but if such cost had been shown, it would not have been within the issue, which required the Government to show what it actually expended in completing the same work, not what it *would* have expended *if it had* completed it. The offer to show comparative cost was really an admission that the work was *not* the same as that which the United States was authorized to perform and which it had alleged it performed.

It is clear that the work left undone was not, as a whole, completed. If part of it could be left undone, or replaced by other work, and the probable cost shown by experts' estimates, *other parts*, or *all*, could be left undone, or replaced by other work, and the probable cost of the whole work shown by such estimates. That is precisely what the *Woods* case holds cannot be done, and what the contract itself expressly means to avoid by providing, not that the United States shall recover such *damages* as it may sustain, or the reasonable cost of the work, but the *actual* cost of *completion*, a provision which in the words of the *Woods* case, "rescued the case from the uncertain and speculative control of expert witnesses, and applied to it the practical test of actual cost."

The United States should certainly be precluded from claiming that the work done was allowable and the change immaterial *by the interpretation it repeatedly placed on the impounding provisions* as material, particularly in refusing Axman permission to make that same change. **It cannot consistently claim against him that impounding was essential and then, for its own purposes, that it was not.**

Apart from everything else the United States *under the pleadings*, cannot properly rely on any showing that the work it did was cheaper. **The contention on which the case was based from first to last was that the United States completed the same work Axman had contracted for—the work left undone.** On that issue, we submit, there can be no right of recovery except on proof of the completion of that work.

THE CHANGE MADE WAS MATERIAL; THE GOVERNMENT DID NOT PROCEED TO COMPLETE THE CONTRACT, BUT DID OTHER WORK INSTEAD.

On the trial plaintiff offered in evidence a contract between the North American Dredging Company and the United States, in which "the work to be done" was not the same as the work to be done under the Axman contract. It was objected that this was a material variance from the allegations that a contract was made "to do the work left undone" by Axman, and that this contract with the Dredging Company was not a contract to do the work required to "complete" Axman's contract, and not a contract for the work for which Axman had agreed to pay. Numerous objections on the admissibility of testimony, and the motion for nonsuit, presented the same question and were sustained by the court. These rulings go to the very gist of the action—to the question of whether any cause of action can be based on the doing of the work included in the contract made with the Dredging Company after the annulment of the contract with Axman.

We contend that the contract with the Dredging Company is not in fact a "contract to do the work left undone by Axman" and that the doing of the work required by the contract with that company is not a compliance with the contract provisions under which recovery is sought here—that the provision of the Axman contract as to annulment made Axman responsible only for the expense

of "completing *the said contract*", and that Axman was not responsible for the cost of anything except the work specified in his contract.

The contract provides that in case of annulment the United States shall have the right to recover from the contractor

"whatever sums may be expended by the party of the first part *in completing the said contract* in excess of the price herein stipulated to be paid the party of the second part for completing the same, * * * and the party of the first part shall be authorized to *secure the performance of the work* or the delivery of the materials by contract, or otherwise, in accordance with law" (R. 85).

What was "the work" involved in these contracts?

The signed agreement (R. 84, 86), and the attached specifications (R. 73), are one instrument, and together constitute the contract (R. 75).

The specifications state what the work is.

In the Axman contract the work is definitely stated:

"The work to be done is to excavate a channel through the shoal * * *; to deposit the spoil * * * within lines drawn between Pinole Point and Lone Tree Point * * *; and to impound the material behind bulkheads or dykes * * * built and maintained by and at the expense of the contractor * * *" (R. 77).

In the Dredging Company contract the work is stated with equal definiteness:

“The work to be done is to excavate a channel, etc., and * * * to deposit the spoil in water exceeding 50 feet in depth, lying within the area bounded by lines drawn from ‘The Sisters,’ etc. * * * The top of any pile shall not be higher than 40 feet below the level of low tide,” (R. 98).

The question, then, baldly stated, is this:

Is a contract to dredge a channel and deposit and impound the spoil at a designated place behind bulkheads completed by dredging the channel and depositing the spoil elsewhere?

Clearly it is not. A contractor undertaking to do the work first mentioned could never hope to recover payment on doing the second task; the latter work could under no circumstances be considered a performance of the requirements of the former contract.

Let us suppose, indeed, that Mr. Axman, with an increased plant, and ample backing, had been given a new contract, binding him, in so many words, “to complete the former contract”, or “to do the work left undone”. Could he, on doing the very same work actually done by the Dredging Company, have pleaded it as a performance of that supposed contract? Obviously not. Yet the cost of that very work “left undone” is the only thing which the Government has reserved the right to recover from him.

Does the work to be done under the first contract include that required by the second? Clearly not.

Mr. Axman working under the first contract surely could not have been compelled to transport the spoil to "The Sisters", five miles away, and there deposit it in piles no part of which should come within 40 feet of the surface.

The question is whether the work done by the Dredging Company was materially different from the work contracted to be done by Axman. We contend that it was. Was the place of deposit a material part of the Axman contract? Unquestionably, yes. The contract emphatically made it an essential part of "the work to be done" (Spec. 26, Tr. p. 139); and in addition it provided—

"Material deposited otherwise than as specified * * * will not be paid for" (Spec. par. 38; Tr. p. 140).

"All dredged material is to be deposited within the limits of the area specified in paragraph 36" (Spec. 39; Tr. p. 140).

"All material must be excavated and deposited under the supervision of the Engineer Officer in charge, or his agents" (Spec. par. 53; Tr. p. 145).

Under these provisions not only was the method of deposit carefully specified, but any other method was expressly provided against and forbidden. If Axman had dug every foot of the channel he could not have collected one cent unless he deposited the material as specified. If Axman had done all the work afterward done by the Dredging Company (for which payment is sought here), he could not have obtained any pay whatever for doing so.

The Dredging Company contract contains the same provisions and the additional one that the deposit of material elsewhere than at "the Sisters" would be ground for annulment (Spec. par. 42; Tr. p. 182).

If, under the second contract, the Dredging Company had in fact tried to do the work left undone by Axman, and complete his contract (impounding the spoil behind a bulkhead), its contract could have been annulled.

Nothing more should be needed to show that the contracts were not the same; that they did not cover the same work; that there was a material change in the work when the second contract was entered into.

It is contended that the provisions for impounding, etc., were "incidental", and that "the principal object of both the original and the main contract was the dredging of the channel". Clearly this was not so. Even in connection with the work of dredging and maintaining a channel of specified depth, the safe impounding of material so as to prevent its being washed back into the cut is vitally material. But a sufficient answer to the argument is that Axman did not contract to bring about "the channel described in the Act of Congress", nor to pay, after annulment, for any and all work connected with dredging such channel. His agreement was to "dredge, deposit and impound", and (in case of

annulment), to pay the amount actually expended in "completing the contract". And by "the agreement of the parties" the deposit of spoil was certainly a part of the work—a part so material that it is specifically provided for in four separate paragraphs; so material that his entire right to any compensation whatever depended upon it.

Plainly these provisions set at rest all question as to the materiality of the change made in the work. What the rule might be abstractly, as to dredging contracts, in general,—whether the disposition of the spoil would ordinarily be an essential or an incidental matter, is not the question; here the parties have in the strongest way made it material and essential and vital.

Nor is it correct to say that the second contract is material "only as it fixes fairly or unfairly", the measure of liability. The question is merely not as to the fairness of making the change, but whether the second contract furnishes at all the measure of liability prescribed by the first. The only measure to which Axman ever agreed, was the cost of completing *the same work he had undertaken*. The cost of doing different work under the second contract is necessarily not such "cost of completion." The bidders figured on different work, the difficulty of doing which entered into their calculation of the price. Whatever experts might have testified to as to the comparative cost of the work under the two contracts, the fact remains that the Dredging Company, in making its bid, figured on different work

and different conditions from those to which the contract referred, and that the work which it undertook to do was not the work which the original contractor had agreed to do.

It has indeed been expressly held that in completing a contract the cost of doing the same work, in accordance with the same specifications, can alone be considered, *even where there has been a breach* and damages are allowed. In *White v. Sisters of Charity*, 79 Ill. App. 646, the contractor had not completed the building properly, and the owner sought to recover as damages the amount it would cost to complete it. The specific defect was in the roof. The cost of remodeling it so as to make a good, tight, durable roof was taken as the measure of damages. The appellate court reversed the judgment, holding that the basis of recovery must be the cost of making the roof *according to the plans and specifications of the contract*:

“The correct theory is the cost *to make the roof according to the contract*, that is, *according to the plans and specifications*, in case the appellant has failed to do so. * * * *That is what the appellant had contracted to do*. The court not only stated that the estimate need not be upon the basis of appellant’s contract, but stated that it should be upon the theory of what it would cost ‘to make a good, tight, durable roof’. This may or may not have been according to contract.”

White v. Sisters of Charity, 79 Ill. App. at 649.

The case is exactly in point here in view of the claim of plaintiff in error that the principal object

of the contract was to provide a channel, and that Axman is properly held liable for the cost of obtaining such channel, in any reasonable way. But completing the contract, as held in the above case, means completing it *according to the same specifications*. The court did not stop to inquire which roof would have been cheaper.

The provisions for disposing of the spoil, in the present case, were integral parts of the contract, not even independent parts or separable provisions, with a separate price for each on which under some circumstances a calculation of the net cost of doing a part of the work could be made. The price to be paid Axman included—in gross, and without any division—the dredging, depositing, impounding, etc. (R .80). The price paid the Dredging Company, similarly, was for all its work, of all kinds (R. 97-98).

By no possibility could these elements of “the work to be done” be separated. Within the terms of the contract they could not be performed except together and as a whole. The dredging and deposit of spoil were not independent parts of the work; they were an *indivisible unit*, constituting, together, “the work to be done”. But the work to be done under the Axman contract was not the same as the work to be done under the Dredging Company contract.

We think this disposes of plaintiff's contention that the deposit of spoil was “but an incident to the performance of the work”, and not a material part

of it. If the deposit of spoil were no part of the improvement contemplated—if it were but a mere incident—the Government would not have provided that all material dredged must be deposited in a specified place; that material not so deposited, either by Axman or the Dredging Company, would not be paid for; and that if the Dredging Company deposited the material elsewhere than as required it would be ground for annulment.

THE CONTRACTOR'S RIGHTS AFTER ANNULMENT ARE SUBJECT TO THE SAME RULES AS THOSE OF A SURETY.

The question of the effect of the change in work may well be considered from the point of view of a surety, for as we view the matter Axman's agreement to pay the cost of completion is subject to the same rules as the obligation of a surety. In effect his agreement was that if the government would arrange by contract or otherwise for completing the work under his contract he would be surety for the completion thereof, by such other contractor, within the stated price; that he would indemnify the United States against having to pay a larger sum.

The provision for annulment, as held in *Chesapeake Co. v. Walker*, 158 Fed. 850, is a drastic one, and confers no rights by implication. On taking the work out of the contractor's hands without an actual breach by him, the government acquires no right to recover from him any general damages, or

The above case also holds that *reletting* work to a second contractor *with changes* is equivalent to *changing the original work*, so far as liability to pay the cost after annulment or breach is concerned.

any damages of any sort except such as are specifically given by the agreement.

Indeed, the effect of the cases arising on annulments is that the contractor (like a surety) is entitled to stand, after annulment, on the very provisions of the contract, and that no recovery can be had against him except what is clearly provided for. As the annulment provision is very drastic and really in the nature of a forfeiture, the rule of strict construction must govern.

Perhaps no principle is better established than the rule that where a surety's liability has been changed by the substitution of one obligation for another, the court will not enter upon an inquiry as to whether the change was in fact detrimental. Where a substantial change is shown, the question of detriment will not be inquired into:

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no farther.

"It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be *for his benefit*. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal."

Miller v. Stewart, et al., 6 U. S. 700, 6 L. ed. 195;

Prairie, etc. Bank v. U. S., 164 U. S. 227, 41 L. ed. 418.

"Any change in the contract on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they never assented.

"Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have the right to stand upon the very terms of their undertaking."

Reese v. United States, 9 Wall. 13.

"It is highly proper that the promisor be permitted to stand upon the exact letter of his bond, in the sense that no conditions or obligations may be imposed by implication, and that no construction should be made which will hold him liable beyond the express terms of his engagement. To this extent he is often properly favored. Where the intent of the parties is clearly expressed in the instrument, or has been fully ascertained from the surrounding circumstances, the rule of strict construction applies, and the Guarantor may stand upon the precise terms of his contract. In this all the authorities are agreed."

Stearns on Suretyship, Sec. 50.

"The bond speaks for itself; and the law is that it shall so speak; and that the liability of sureties is limited to the *exact letter of the bond*, and if the words will not make them liable, nothing can. There is no construction, no equity against sureties. If the bond cannot have effect according to its exact words, the law does not authorize the court to give it effect in some other way, that it may prevail.

State v. Medary et al., 17 O. 565.

“‘Non haec in foedera veni’ is an answer in the mouth of the surety from which the obligee can never extricate his case, however innocently or by whatever kind intention to all parties he may have been actuated. * * *

“He is not bound by the old contract, for that has been abrogated by the new; neither is he bound by the new contract, because he is no party to it; neither can it be split into parts so as to be his contract to a certain extent and not for the residue; he is either bound in toto, or not at all.”

Brandt on Suretyship, at page 812.

“The rule of law is not disputed that the liability of a surety cannot be extended beyond the actual terms of his engagement; and that his liability will be extinguished by any act or omission which alters the contract unless it be with his consent. * * *

“And it is no answer to a surety to say that the alteration is not material. He has a right to determine for himself whether he will or will not consent to the alteration—whether *he thinks* it material or immaterial. * * *

“The law will not allow others to speculate as to whether or not the alteration be to his prejudice. Adhere to this rule and the course of courts is safe and simple. Depart from it and there is no limit—where will you stop?”

Taylor v. Johnson, 17 Ga. 521.

“In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended that what was done was *beneficial* to the surety, and the answer has always been that the surety himself was the proper judge of that, and

that no arrangement, different from that contained in his contract, is to be forced upon him."

Lord Langdale, Master of the Rolls, in *Calvert v. London Dock Company*, 2 Keen 638, quoted in

Prairie State National Bank v. U. S., 164 U. S. 227, 41 L. ed. 417.

"The true rule, in my opinion, is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is, *without inquiry*, evident that the alteration is *unsubstantial*, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is *not self-evident* that the alteration is *unsubstantial* or one which cannot be prejudicial to the surety, *the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration or allow* the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged."

Holme v. Brunskill (1877) L. R. Q. B. Div. 495,

quoted in

Prairie State National Bank v. U. S., 164 U. S. 227, 41 L. ed. 418.

"A material alteration of a contract is such a change in the terms of the agreement as either

imposes some new obligation on the party promising, or takes away some obligation already imposed.

“Any change in the terms of the original contract which obliges the original debtor to do something which he has not before been bound to do will discharge the surety or guarantor. This is said to result from either of two reasons:

“(1) It is an increase of the promisor’s risk or hazard, etc.

“(2) *The contract as changed is not the same contract guaranteed by the promisor.*

“His execution of the original contract will not carry by implication any liability upon a substituted contract, *although the latter is similar to the first.*”

Stearns on Suretyship, Sec. 72.

“*The question does not depend upon whether there was an increase or diminution, in dollars and cents, of the contract price, but upon a change in the contract itself. If a change be made in the contract, without his consent, the surety is discharged.*”

Burnes Estate v. Fidelity & Deposit Co., 70 S. W. 518, 96 Mo. App. 467.

In a recent California case alterations amounting in value to \$315 were made in a certain contract for a \$16,300 building, *the owner agreeing to pay the additional expense.* It was held that the surety was released. The court said:

“There is no principle of law better settled than that a surety has the right to stand upon the very terms of his contract, and that any alteration in the terms of the principal’s contract, made by the parties thereto without his assent, will have the effect to discharge him from all liability.

"By such alteration the contract ceases to be the one for which he became surety, and the extent of such alteration, or whether his liability will be increased or diminished thereby, is immaterial.

"Having the right to determine in the first instance whether he will become such surety or not, he has the right to be consulted upon the terms proposed for any variation of his obligation, and if made otherwise his obligation is extinguished."

Alcatraz Masonic Hall Ass'n v. U. S. Fidelity & Guaranty Co., 85 Pac. Rep. 157-8.

The case of *Durrell v. Farwell*, 88 Tex. 98, 30 S. W. 539, though arising in a different kind of transaction, presents the rule very clearly that *when the contract specifies certain things to be done, no liability arises from the doing of something else*, whether or not the change caused injury; exactly the question here as to the completion of the contract.

The syllabus presents the case:

"A corporation, to secure its bonds, gave a trust deed of its property, which provided for a sale thereof at public auction upon default in payment of interest, and, as further security, G., the President of the corporation, made a deed of trust of certain land, with the express condition that such land should be liable for the payment of the bonds only in case a sale of the property mortgaged by the corporation should be made, 'in accordance with the terms' of the mortgage, and the proceeds of sale should prove inadequate. The bondholders thereafter, contrary to such provision, assumed control of the property described in the trust deed made by

the corporation, sold it at private sale, and applied part of the proceeds to the expenses of the corporation. Held, that G's. land was thereby released from liability for the payment of the bonds."

Durrell v. Farwell, 88 Tex. 98, 30 S. W. 539.

Taking up the arguments advanced there, as here, that the change of plan worked no injury, etc., the court said:

"It does not matter what circumstances may have transpired to cause a different method to be pursued by the bondholders; if they chose to accept other methods * * * they could not hold the land liable. * * *

"It is not the province of the court to inquire into the matters which operated upon the parties in specifying the particular things to be done, or whether or not the failure to do the very thing required was *injurious to the surety*; it must be enforced as the parties made it. In order for the bondholders to avail themselves of the additional security afforded by the deed of trust, they must have strictly followed its provisions and complied with its terms."

Durrell v. Farwell, 88 Tex. 98, 30 S. W. 539.

The section of the Civil Code of California, the State in which the contracts were made and the controversy arose (cited in *Alcatraz etc. Ass'n v. U. S. etc. Co.*, supra), seems in itself determinative of the question:

"A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is *altered in any respect*, or the reme-

dies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

Civil Code, Sec. 2819.

Under Section 2840 of the same code, a surety is exonerated "in like manner with a guarantor". We submit that these sections state the recognized rule of the common law. The court will not inquire whether Mr. Axman's obligation was altered to his detriment, or to his advantage; the sole test is whether "the original obligation of the principal is altered *in any respect*". Beyond any question Axman's obligation was altered here, if it continued at all after the change.

In the case of *U. S. v. Freel*, the question of the effect of a change in a similar contract was passed on in the Circuit Court, the Court of Appeals, and the Supreme Court, in each of which it was held that the surety was released.

The contract in the *Freel* case was to construct a dry-dock, at the navy yard at Brooklyn, "at some point on the water line, to be thereafter selected". By a later agreement in consideration of additional payments, the location was changed to a point not on the water line, but sixty-four feet inland.

The authorities were very fully considered by Judge Thomas in the Circuit Court, and the conclusion reached that such a change released the sureties whether it were for their interest or not. The decision was not based on any ground of possible detriment, etc., but on the express ground that

“the surety assures the performance of a certain contract, and his liability is conditioned inflexibly upon the continuance of the very terms of that contract.

“He who would charge a surety for his principal’s breach of contractual duty must travel without deviation the way pointed out in the contract.”

U. S. v. Freel, 92 Fed. at 306-307.

The agreement in this case to deposit spoil behind a certain line near Pt. Pinole “at a point to be designated”, is obviously identical in kind with the contract in the *Freel* case to erect a dry-dock at a point on the water line, to be thereafter selected. The change in location—to some point not on the water line—was held to release the sureties, in that case; the change in the place of deposit—to a point entirely away from Pt. Pinole—is strictly analogous here, and certainly has the same effect both as to the surety and as to the contractor himself.

The decision in the above case was affirmed by the Circuit Court of Appeals, which said that it was self-evident that the new contract “altered the requirements of the original contract in matters of substance” (*U. S. v. Freel*, 99 Fed. 239), and by the Supreme Court, which said:

“The proposition that the obligation of a surety does not extend beyond the terms of its undertaking, and that when this undertaking is to assure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance without his consent, his liability is extinguished, is so elementary that we need not cite the numerous

cases in England and in the state and Federal Courts establishing it. Many of these cases will be found cited in the opinion of Thomas, J., in this case" (92 Fed. 299).

U. S. v. Freel, 186 U. S. 309; 46 L. ed. 1177.

That the surety on such a contract as this is released even by a mere waiver, by the Government, of part of the work, was decided in *U. S. v. Corwine*, 1 Bond. 339, Fed. Cases 14871, a very similar case in which it might well have been contended that the change was indeed "to the manifest ease" of the defendants. The contract there was to dredge and keep open a channel twenty feet deep. The Government accepted a channel eighteen feet deep, thus waiving part of the work. It was held, however, that as the sureties had never agreed to keep open an eighteen foot channel they were discharged.

"The United States waived that part of the contract which specified the depth of the channel, and accepted the work with a channel of less depth. The sureties are in no sense parties to this arrangement, and therefore not bound by it."

U. S. v. Corwine, 1 Bond. 339; Fed. Case 14871.

So here, Axman never became a party to any arrangement to waive the provision for impounding, and accept the work without it. The principle of the case is simply that a liability to dredge and keep open a channel of specified depth is not a liability to dredge and keep open a channel of different depth.

So, here, a liability to pay for dredging a channel and depositing the spoil in a specified place is not a liability to pay for dredging a channel and transporting the spoil somewhere else.

**THE CHANGE WAS DETRIMENTAL AND NEW OBLIGATIONS
WERE IMPOSED.**

However, *even if the deposit of spoil were only an incident*, and an independent part of the work which might be waived, this could not give a right of recovery here. This was a provision highly beneficial to the contractor. The contract required that the channel be kept open until completed; the secure impounding of the material was the means of so doing. Colonel Heuer would not allow the spoil to be deposited even in the slack water adjoining the bulkhead, for fear it would flow back into the channel (R. 147). The contractor never undertook that the work could be done at the price specified, if the spoil were merely dumped in the bay channel itself, where the tides could carry it back to the excavation; but that was what the Dredging Company agreed to do, at the price it charged for its work. The Corwine case seems conclusive here—where a contractor, and his surety, agreed to keep open a channel under certain conditions, the Government cannot change the conditions and still hold them liable.

Apart from this, however, there is another fundamental reason why this change is not “to the

manifest ease of the defendants". *The change imposed new obligations.* Neither Axman nor his surety ever agreed to pay for transporting material to "The Sisters"—five miles across a windy bay—depositing it there; and taking measurements to prove that the top of no pile was within forty feet of the surface. The cost of all this was included in the Dredging Company's bid, and in the amount paid it, for which recovery is sought here. Can it be said that it is self-evident that the surety could not be harmed by this? There is nothing in the record to show that the Dredging Company's contract was on "more favorable terms" as to the place of depositing the spoil. On the other hand, the evidence is that San Pablo Bay is rough and windy and subject to heavy storms (R. 129). The place of impounding was from $1\frac{1}{2}$ to 2 miles from the dredging site (R. 78); the place of deep water deposit was 5 miles away (R. 99). But whether the deposit of spoil at "The Sisters" was easy or difficult would be immaterial; Axman and his surety never assumed any obligation to pay for it. At the very utmost, *if* the Government could have waived the whole provision as to impounding, it could not charge the contractor for any work that was substituted therefor, *but only for the cost of the dredging.* Even if the Government could waive the impounding, therefore, it could not recover for any part of the expense of operating the Dredging Company's scows, tugs, dump barges, etc., engaged in carrying spoil to "The Sisters", making

measurements, etc., or any expense except that of the dredger itself. But its bid included all this; there is nothing at all to indicate how much of the expense was for dredging, and what proportion of it was spent for transporting and depositing.

Plainly Axman never assumed any liability for the cost of transporting spoil to "The Sisters", and a waiver of something else could not impose it on him.

The contract also included redredging to remove any filling that might occur during the time the second contractor was engaged in the work, including any filling in that might occur between July 3, 1905, the date for completion under Axman's contract, and August 19, 1906, the date for completion under the second contract. Such redredging was necessarily much more expensive than the usual dredging, as the material to be paid for—that which lay above grade plane—would in all probability be small but the amount necessary to be removed would be much greater; this is because of the construction of the dredger buckets employed in such work, which sink several feet in the mud each time they are lowered, and excavate five to six feet deep even if there is only one foot, or a few inches, above the grade plane, to be removed (R. 128). This expensive redredging was necessarily considered by the bidders on the second contract, and must have increased the price per yard at which they bid. And apart from the price it also increased largely the amount of work which had to be done in the limited time

allowed. This redredging of a year's silting from part of the channel was work not included at all under Axman's contract.

A surety's contract cannot be

"split into parts so as to be his contract to a certain extent and not for the residue; he is either bound in toto, or not at all."

Brandt on Suretyship, at page 812,

and the same rule applies here to Axman's indemnity agreement to pay the cost of completion. Even if his liability could be so "split into parts" there could be no recovery here, as there is nothing to show how much of the price paid the second contractor was for the new work not included in Axman's contract.

The whole matter comes back, of course, to the proposition that such a change in the principal's obligations releases the surety. This court, the highest English tribunals, and the ruling cases in our state courts lay down a rule which is unassailable, as far as a surety is concerned, and which, as we have already pointed out, applies equally to the reservation of rights against the contractor under drastic provisions for annulment, which are in the nature of a forfeiture, and under which the contractor is in effect made a guarantor or surety for some one else.

We submit that counsel for United States wholly failed to show error in the ruling of the Circuit

Court of Appeals that the change made in letting the Dredging Company contract was a material change, and that the Government did not proceed to complete the contract and to do *the* work Axman left undone, and therefore cannot recover.

THE CONTRACT DID NOT AUTHORIZE SUCH CHANGE.

Another proposition advanced by plaintiff's counsel, however, is that the right was reserved to the Government to make such changes as might be necessary or expedient to carry out the intent of the contract (p. 7). This contention seems based on a misapprehension of the contract provisions.

The contract *forbids* the making of any changes that will either increase or decrease the cost except with the consent of the contractor, in writing (R. 63), and prescribes the one method by which changes can be made even with his consent—that they “must be agreed upon in writing by the contracting parties,” and the agreement approved by the Secretary of War (R. 63). Under these provisions no recovery can be had here.

The provisions here in question are:

“If at any time during the course of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether labor or material, as would either *increase* or *diminish* the cost of the work then such change or modifica-

tion must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reason for such change and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War."

This is not a case, therefore, where the Government had the right to change the work to be done, without the consent of the contractor; nor is it a case where the contractor or the surety ever agreed to any change. The changes made were certainly "of such character and quantity as would either increase or diminish the cost of the work". The making of such change, therefore, unless agreed upon in writing by the contracting parties (Axman and Heuer), was in direct violation of the provision.

The provision of the specifications as to the right to make "minor changes" does not conflict with the above; if it did the contract provision, above, would necessarily control as it is the later in date and the main substantive agreement of the parties. But there is no conflict between the two as the provision referred to concerns only "minor changes" and the obvious intent is only to provide that no extra charge shall be made by the contractor for such changes. Moreover, the wording of said specification expressly makes it subject to the above paragraph of the contract in providing that no increase of cost shall be allowed "except as provided in the form of contract to be entered into"(R. 81); and when the

contract was entered into the method there "provided" was that above set forth, that any change involving increase (or decrease) of cost must be agreed upon in writing. The change now under discussion did increase the cost, and is governed by the contract provision.

A provision of this sort, prescribing how changes may be made, is strictly construed.

The effect of a provision allowing changes to be made in the work—very similar in its terms to the one in this case—was passed upon in *U. S. v. Freel*, 92 Fed. 299; 99 Fed. 239; 186 U. S. 309; 46 L. ed. 1177, in which the provision was strictly construed and the changes held to be unauthorized.

The contract there was to construct a drydock, at the Brooklyn navy yard, "at some point on the water line, to be thereafter selected". It contained a provision that changes in the plans and specifications might be made, by consent. By a supplemental contract, the location was changed to a point 64 feet inland. The Circuit Court, Circuit Court of Appeals, and Supreme Court, in turn, all held that the provision as to changes was to be interpreted strictly, and that as the specifications did not include the location of the work, changes in that were not authorized. In that case, as the contractor consented to the change, the point was raised only by the surety; but here the contractor did not consent.

In the *Freel* case, as pointed out by this court, there was not only a provision in the contract allow-

ing for changes, but an express provision that such changes would not release the surety. There is no such provision here. But even in the Freel case the Supreme Court doubted whether the contract warranted "so wide a departure from the plans and specifications" as were made by another supplemental agreement changing the size of the dock and extending the time of performance.

The rule has been laid down in many cases that under such provisions as the above changes can be made only in the manner prescribed, and that if they are made otherwise all liability is waived.

When the contract is annulled, the parties' rights are fixed. How can one afterward tinker with it so as to impose new burdens on the other? It requires two parties to make a contract; it takes two, also, to modify it. The United States had agreed with Axman that the requirements of the contract would not be varied except by his consent; having then undertaken to complete his work, it would certainly not be at liberty to change those requirements as it saw fit, and still hold him for the cost of the work.

The provision in the Axman contract that changes must be agreed to in writing is analogous to the requirement of building contracts that a certificate shall be obtained from an architect or an engineer. Both contractor and surety are entitled to insist on this provision, after the annulment or abandonment of the contract.

The case of *American Bonding Company v. Gibson County*, 127 Fed. 671, like the present one, was

based directly on a provision allowing the county to "complete the work" after annulment. The provision required that the cost of the work be audited and certified by the architects—just as the present contract requires that any changes be agreed to in writing by Axman, and that the cost be set forth in the agreement. The certificate, in that case, was not obtained "and no reason was given for its non-production except that it was not necessary, because the contractors had abandoned the contract". The court held:

"If there be in the contract a provision for ascertaining the amount of damages incurred through a violation of any of its provisions, the surety has a right to insist on its observance before being held responsible. * * *

"Under the contract, *the contractors and their surety* had a right to insist on a certificate from the architects before paying the county for work done after it took over the job * * *."

American Bonding & Tr. Co. v. Gibson County, 127 Fed., at 673.

The following, from the same decision, is also strikingly in point:

"In case the contractors failed to finish the work, the owner might take over the job by complying with certain provisions. But if he did he was obliged to *complete the work in accordance with the specifications*, and before he could collect what it cost beyond the contract price he had to have the certificate of the architect showing the expense and damage incurred" (p. 674).

The point here is not a technical one as to whether or not some certificate was obtained, but the essential one that the work was substantially changed without Axman's consent, after the United States had stipulated that it would not be changed except with his consent.

Under this provision the cost of the substituted work was required to be stated in writing in advance by agreement of Axman and Heuer. We contend that we are not liable at all for the cost of the work involved in the change, but at all events such writing, signed by Axman, is the only way of showing its cost.

Of such a provision as to measure of liability this court has said:

"The contract is a law between the parties in this respect, as they expressly agree that the amount of the service shall be established by the certificates of the commanding officer. * * *

"Is not this part of the contract as obligatory as any other part of it, and if so, is not the obtaining of the certificate a condition precedent to the payment of the money?

"Where the parties, in their contract, fix a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part to be done to carry it into effect."

U. S. v. Robeson, 9 Peters 319; at 327; 9 L. ed. 143.

There was "a change or modification in the project". Whether it increased or diminished the cost

is immaterial, under the express terms of the provision. In either case the written agreement of the parties is made essential, and is made the only measure of the amount to be paid. In the absence of such writing there can be no recovery.

These decisions make it plain that such a clause is interpreted strictly, and that it cannot be extended to changes that are not brought within its terms, even where the contract was let on the theory that changes in the work to be done might become absolutely necessary. Where, as here, the consent of the contractor is required, but the change is made without it, he is certainly released, as such a change is necessarily not within its terms.

The question is not whether the government would have had to do the work exactly and precisely as required by the specifications. The change made was material and substantial. The identity of the work was changed; the things to be done under the second contract were not the things contemplated by the first. The rule is well stated in *Reissans v. White*, 106 S. W. 607:

"The one class of cases, those dealing with mere permissive deviations in acts or omissions of performance. * * * turn upon the question of the materiality of such deviations, and the inquiry directs itself to ascertain whether or not the deviation was substantial or insubstantial * * * The other class, * * * where the original contract has been departed from, not merely a permissive departure, however, but a departure made in conformity to one or more subsequent express or implied agreements, turn

upon the question whether or not the identity of the surety's contract has been destroyed by the principal parties adding to or deducting one or more new terms or stipulations therefrom without his consent, and if so the surety is discharged. In such cases it is wholly immaterial whether the surety's risk is increased or diminished. The mere destruction of the identity of the contract without the surety's consent is sufficient to operate his release."

Reissans v. White, 106 S. W. 607.

The change there was made at the request of the contractor. By it a skylight differing from the one specified was installed; it involved no extra expense. It was, said the court, "a concession made to him, without the consent of the sureties". But

"It nevertheless ingrafted a stipulation upon the contract between the original parties which operated to change its terms from those assumed by the sureties at the time of executing the bond."

Reissans v. White, 106 S. W. 607.

While the above case was as to the liability of a surety after changes had been made without his consent, the same rule must apply in favor of the contractor where his consent was necessary and where changes made without it "change the terms from those assumed by (him) at the time of executing the (contract)".

In short, the change made here was in no way authorized by the provision of the contract relating to changes, and in fact was in violation of that provision, and that the annulment of the contract does

not in any way affect the right of the contractor to insist that he is not liable for the cost of the change in the absence of a written agreement by himself specifying the change, the reasons for it, and the cost.

THE McMULLEN CASE.

In view of the importance given to this case in the brief for the United States we deem it proper to consider it somewhat in detail for the purpose of pointing out—even at the risk of elaboration—the absolute unlikeness of the issues of that case and the case at bar.

The *McMullen* case arose on the contractor's utter failure to complete the work within the time limited, or a year or more thereafter, and its entire abandonment of the contract. The *Arman* case arose on the Government's taking the work out of the contractor's hands almost at the start, when less than one-third of his time had expired, and he was working with the utmost diligence. The *McMullen* case sought recovery of damages for the breach. The present case seeks payment under a contract provision whereby the work was to be completed at the contractor's expense in case of annulment. In the *McMullen* case the first contractor had figured on both methods of deposit, and the contract expressly provided for the use of both methods of deposit, at the same price per yard for each. In the case at bar one method was rigidly prescribed; not only was the

other not mentioned, but any method other than the one prescribed was absolutely forbidden. Under the *McMullen* contract the contractor was to follow one method or the other, as ordered, and the Government expressly reserved the right to change the amounts disposed of under each method to any extent; under the *Axman* contract no change of any sort could be made without *Axman's* consent (except, perhaps, "minor changes"). In the *McMullen* case the relet contract was, expressly, a contract to continue with work under the original contract, under its specifications, which were attached as the specifications for the new contract; in the *Axman* case the new contract was an independent contract in which the work to be done was independently described, under specifications materially different from the work to be done under the original contract. Finally, in the *McMullen* case all of the work actually done under the relet contract was work which was provided for in the original contract; in the *Axman* case, part of the work done under the new contract was work *not included* in *Axman's* contract at all, and which he could not have been required to do, and, in fact, was prohibited from doing. In short, the cases are wholly unlike, with the unlikeness of complete contrast, so that the reasoning which held the defendants liable in the *McMullen* case leads to the contrary holding here.

While the decision in the *McMullen* case and the contract and briefs in the present case both allude to "completing the contract", the meaning in that

case and in this is entirely different. In the *McMullen* case the argument was that the relet contract did not contemplate *completing* the work; that is, completing the *project* of forming a deep-water basin in the river. In the present case the point is as to completing *the work*—that the work provided for by the second contract was not *the work*, but *other different work*.

In view of the discussion herein of the facts of the present case and the law applicable thereto as we see it, the above statement of the facts of the *McMullen* case might of itself serve to show the inapplicability here of the rule announced there. Consideration of the *McMullen* contract and what was done in connection with it, and of the contentions made and passed upon in the case, will, we believe, prove beyond question the truth of our introductory statement that the case was decided on the basis of the features wherein it *differs* from the present case, and that it is wholly inapplicable here as an authority for the United States.

The essential clause of the *McMullen* contract (as to the work to be done) provided for

“the construction and completion in all respects of the dredging at said naval station in strict accordance with, and subject to, all the conditions and requirements of the specifications,” etc., etc., “for the sum of fifteen cents per cubic yard for items 1 and 3 and ninety-nine cents per cubic yard for items 2 and 4”, etc.

(Record, *U. S. v. McMullen*, p. 6.)

The specifications provided:

"1. GENERAL DESCRIPTION.—The channel of the Beaufort River shall be increased in width and depth by dredging, so as to form a deep water basin opposite the station. *If required, a part of the material dredged shall be deposited in the station; the remainder shall be disposed of elsewhere, as may be allowed by the engineer of the district* (p. 8).

"2. QUANTITY OF DREDGING.—The amount of material to be removed is estimated as about 1,000,000 cubic yards. The quantity is approximate only, and may be increased or diminished as the funds allotted for the work may allow or require (pp. 8-9).

"6. DEPOSIT.—The Government proposes to increase the area of the station by purchasing adjoining lands; therefore *a part of the material shall be deposited on and within the boundaries of the station as they now exist, or may be in the future, at points to be designated by the commandant. The quantity required to be deposited on the station is about 49,000 cubic yards, but the Government reserves the right to increase or decrease the amount to any extent. Material deposited on station shall be leveled and graded*" etc., etc. (p. 9).

"32. BIDS.—Bidders will make separate and distinct offers for each of the following items of work: Item 1.—A price per cubic yards for earth dredged and deposited on the station, leveled and graded. Item 2. A price per cubic yard for rock dredged and deposited on the station, leveled and graded, if required. Item 3. A price per cubic yard for earth dredged and not deposited on station. Item 4. A price per cubic yard for rock dredged and not deposited on station" (pp. 11-12).

The contractor thus fixed a price (15 cents) for each yard of earth whether deposited on shore or

in the water (items 1 and 3) and similarly a price of 99 cents for each yard of rock, whether deposited one way or the other (items 2 and 4), and was bound to deposit on the station any amount, large or small, that the Government required.

The contract provision as to annulment and damages was:

“If the (contractor) shall fail in any respect to perform this contract, etc., it may, at the option of the United States, be declared null and void, without prejudice to the rights of the United States to recover for defaults herein or violations hereof, etc. (also, provision for liquidated damages equal to penalty of bond) (p. 7).

Under the contract the contractor was to complete the work February 28, 1899. Just prior to that date the Secretary of the Navy extended the time to December 30, 1899. We quote from the court's statement of facts:

“But in about two months the contractor stopped work and asked leave to dump in deep water instead of on shore. * * * Finally leave was granted on February 21, 1900. The contractor, however, did no more work after April, 1899. On May 21, 1901, the Navy Department declared the contract void” (p. 468).

At the time the requested permission was granted no work had been done for nearly a year; no more was ever done. The work had been abandoned for over two years when the contract was annulled. The notice of annulment followed the contract provision as to reservation of rights. It stated that

the United States declared the contract null and void "*without prejudice to their right to recover for defaults therein or violation thereof*" (p. 53).

Such reservation obviously covered the right to recover damages for non-performance, which had fully accrued. The brief for the United States so argued:

"The contract had been broken, and the contractor was liable for the breach" (p. 20).

and the opinion of the court so pointed out:

"At the time when the notice was given, it was merely a ceremony to mark the point of default as a preliminary to employing some one else. The obligation of the contract, *so far as applicable to a case of default*, remained in full force" (471).

After annulment the Government let a contract to another contractor the basic provision of which was that he would provide all labor, etc.,

"for the completion in all respects, of dredging and removing seventy thousand cubic yards, more or less, of material from the waters of said naval station * * * in strict accordance with and subject to, * * * the plans and specifications appended hereto and forming part of the contract * * * the work to be done being that contemplated in items 3 and 4 of paragraph 32 of said specifications" (R. 45, McMullen),

those items providing for the removal of earth or rock, and the deposit thereof in deep water. The very first provision of said specification was

*“It is the declared and acknowledged intention and meaning to secure the completion of the work of dredging a channel * * * according to plans and specifications which were attached to and formed a part of a contract between the New York Dredging Company, * * * and the United States, * * * said contract having been declared forfeited”, etc. (p. 17).*

The specifications next stated the work completed and appropriation available, and set out a reprint of the original specifications as the specifications to govern the work under the new contract.

A clear method of contracting for the continuance and completion of a contract could hardly be devised. On completion of the work the United States brought suit to recover the damages sustained through the first contractor's failure to perform. The main contention of the sureties was that the original extensions of time had released them. Apart from this they also contended that they were released by the contract having been changed when the contractor's request as to dumping in deep water was granted and also that they were released because the *work* had not been completed—meaning thereby the entire project of approximately 1,000,000 cubic yards, contemplated as possible when the first contract was let, to wit, creating a basin thirty feet deep by widening and deepening the channel of the river.

The first contention, as to extension of time, obviously does not concern us here.

The argument as to change of work was so insubstantial as to be almost impalpable. Admitting, as they had to, that the Government had the option to order the contractor to deposit all the spoil on shore, counsel for *McMullen's* sureties nevertheless contended that there was a change—that a provision that the Government *might* require something, at *its* option, is different from a provision that it would require it. As a matter of syntax it is different; but as to the obligations it imposed as to doing that required something it is precisely the same. And there could be no possible difference to the contractor who, as in the *McMullen* case, had agreed to do the work in either way at the same price—e. g., to dredge rock and deposit it on land, if required, at ninety-nine cents per cubic yard, and also to dredge rock and deposit it in deep water, if required, at ninety-nine cents per cubic yard. If anything further is needed to show the utter absence of any “similarity of issue” as to this matter of change of place of deposit, it is surely supplied by the following statement of the contention in the *McMullen* case as set forth in the brief itself in that case:

“Although the original contract did provide that the amount to be placed on shore could be increased or diminished by the United States, this provision did not permit that the United States should by a binding agreement agree to accept less than what New York Dredging Company has contracted to do. In other words, while not requiring any of the material

to be placed on shore could not release the sureties; contracting by the United States and New York Dredging Company, to change the work so that none could be required to be placed on shore might release the sureties. Under the original contract, the United States had the right to have the material placed on shore. United States need not have required any of it to be so placed to comply strictly with contract. But after the change in the contract, the United States did not have the right to have all the material placed on shore. To that extent the contract was changed" (Br. p. 65).

Can it be said that such a contention has the remotest resemblance to the argument of the defendants here, or that a decision on it has any relevancy at all to the question at issue in this case? We submit that it cannot.

The "change" there was utterly unsubstantial and as to something on which the contractor could have been compelled to submit to a change at any time. As the court says:

"The Government reserved an absolute right of choice in this regard" (p. 472),

which clearly distinguishes the case from the present one, in which the Government, instead of reserving such right, relinquished any right of change by agreeing that none could be made without Axman's consent.

An equally clear distinction between the cases is that the contention and therefore the decision in the McMullen case (so far as the latter can be con-

sidered to have passed the matter of change at all) did not involve any question whatever as to variance between the first and the second contract. The second contract there did not make a change in the work at all and was in the strictest sense a contract to proceed with the very work which was required by the terms of the first contract at the time it was annulled. The ruling on the point is therefore entirely inapplicable here, for at least two reasons: firstly, the contract was, expressly, to do the work left undone; secondly, there was no obligation on the Government there, as there is in this case, to complete the contract, that case having been brought to recover damages after breach, and not involving any issue as to how a change in the work to be done affects the right to recover, after annulment, for completing a contract.

The other contention was that the Government had not completed the first contract as it had alleged. The point was not as to the identity of the work as here, but was merely that the first contract was that the channel would be deepened to a specified depth, and widened—that it was to be “increased in depth and width * * * so as to form a deep water basin” and that the area would be dredged “to a depth of thirty feet below low water”—and that the Government had not contracted with the second contractor to dredge the channel to that depth or so as to form such basin, but merely to dredge 70,000 yards, more or less, at a stated price.

per yard (see p. 85, p. 89, of Brief of Defendants in Error, *U. S. v. McMullen*).

There is no reference to this contention in the brief for the United States; but in another connection that brief points out that the first contract was really for *so much dredging as the appropriation would pay for*; and in fact the second contract was similar, the proposal and specifications setting for the unexpended amount of the appropriation (about \$87,000) available for the work; the price \$1.25 per yard fixed the amount "70,000 yards more or less" (see p. 29 of Brief for United States in *United States v. McMullen*). The above contention and circumstances are evidently what the court had in mind in saying:

"The objection that the second contractor does not appear to have completed the work intended to be accomplished by the first, *that is, to have made a channel of a certain depth*, does not impress us. The first contract was for certain work for a certain object, *but limited and subject to change as the appropriations might require*. The second was for the same on the same plans and specifications, the only difference being in the parties, the price and the liberty given to the second contractor to dump in deep water, which diminished the cost. In the first contract the Government reserved an absolute right of choice in this regard. *Whether the object of the contract was attained is immaterial, so long as the work done towards it was work that the first contractor had agreed to perform*" (pp. 471-472).

In other words the court pointed out that the contentions that the Government had not completed

the work was *not well founded in fact*; that while the Government perhaps had not completed the project and attained the object of the contract,—the proposed improvement—it had, by the second contract, gone on with and completed *the work*, that is, the doing of such dredging as the appropriation would pay for. The contention and the decision on it have absolutely no bearing on the matter of *identity of work*, which is the point of issue in the case at bar.

We may add that a final distinction between the two cases appears in the last words above quoted—“so long as the work done * * * is work which the first contractor had agreed to perform”. In the one case the contractor had agreed to deposit the spoil in one place or the other as ordered, and the method imposed on the second contractor was one which the first therefore had agreed to; in the other case much of the work done under the second contract had never been agreed to under the first. We do not understand, however, that the sentence referred to (dealing as it does with the peculiar question of whether the *object* of the contract has to be attained in fixing damages after breach) has any applicability to the question in hand as to fixing liability for excess cost of completion in case of annulment.

The reference to the change in the place of deposit having “diminished the cost” seems to have been by inadvertence. The matter of comparative cost was not in the case at all. The first contractor had made the same price for both methods of deposit; the second had bid only on one method. No testimony on comparative cost was given.

—change of place of deposit, completion of work, etc.—and because the importance attached to the decision of the learned Solicitor General seems to indicate that the decision itself, standing alone, might be misunderstood as deciding matters which in fact were not at issue in the case. Consideration of the record shows, as we have pointed out, that the questions relating to “change” and “completion” in that case was absolutely different from those at issue here.

The decision itself, apart from the question of extension of time, really holds

1. Giving the notice of annulment after breach did not affect the liability for *damages*, because that liability had already become *fixed by the breach*, and the notice of annulment expressly *reserved the right to recover damages*. None of these elements is present in the case at bar.

2. The point as to the work not having been completed because the general object was not attained is not well taken because the second contract, let on the same specifications, was for *exactly the same work as the first*, that is such work as the appropriation would pay for. This identity of contracts is absolutely lacking here, the North American Dredging Company contract being entirely independent of the Axman contract and for different work.

3. The change in place of deposit was immaterial as the Government reserved *an absolute right of choice in the matter*—the contrary being the fact in this case, where the Government had no choice and could not make such change without Axman's consent.

4. That the general object was not attained is immaterial because the question is not as to general object but whether all the work done by the second contractor was work *for which the first had agreed to be liable*. Here a great part of the work of the second contractor—transporting, measuring, redredging—had never been agreed to by Axman.

On every point the decision is expressly and essentially based on the presence of an element that is lacking here, and on every point the reason of the decision requires a contrary ruling here.

Such is the authority—the one case—on which the Government relies in this matter. **We submit that it is a controlling authority against the Government's contention.**

Conclusion.

We regret that we have had to extend this brief to such length. It has seemed to us that our duty to the estate of Mr. Axman, and our duty to the court, required us to present fully the argument against what we consider to be an improper claim, unfounded either in law or justice. Yet, as we have written, it has seemed as if all the argument is perhaps unnecessary; that behind all the discussion there is one central vital, unanswerable *fact* that lifts the case clear of all the rules of law and that apart from legal reasons altogether necessitates a judgment that Axman did not die a defaulting contractor and did not cause one cent of loss to the

United States in the matter directly or indirectly—the fact that he himself offered to do, without extra charge, the very work for which the Government paid \$65,000 additional to another (Br. for United States, p. 3; R. 126, 127). *He* did not cause or bring about the expenditure of that money; *he* stood ready and willing to save the Government from any loss. That fact in our judgment constitutes a conclusive answer to any claim that the Government paid out the money either *necessarily*, or *properly*, or *through any fault of Axman*, or that the amount paid was *reasonable*, and a conclusive defense to the attempt to enforce against the estate of the contractor a **liability for \$65,000 as the cost of doing work which plaintiff refused to allow him to do for it for nothing.**

Respectfully submitted,

AITKEN & AITKEN,
~~FRANK W. AITKEN,~~
 JOHN R. AITKEN,

*Attorneys for Julia A. Axman, Executrix
 of the Last Will and Testament of
 Rudolph Axman, Deceased.*

FRANK W. AITKEN,
Of Counsel.

INDEX.

	Page
Introduction	1
Facts Prior to Annulment	2
Facts Subsequent to Annulment	14
Issues	12
Errors	17

ARGUMENT.

Point I—Contract and evidence excluded did not tend to prove issues	18
Point II—Contract fixed method of proving damages	20
Point III—No change could be made after annul- ment	27

TABLE OF CASES CITED.

Baer vs. Sleicher, 163 Fed. 129	26
U. S. vs. Freel, 186 U. S. 309	27
U. S. vs. McMullen, 222 U. S. 460	21, 26, 27
U. S. vs. O'Brien, 220 U. S. 321	24

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 242.

UNITED STATES OF AMERICA,

Plaintiff in Error,

VS.

RUDOLPH AXMAN AND AMERICAN BONDING
COMPANY OF BALTIMORE,

Defendants in Error.

**IN ERROR TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE
NINTH CIRCUIT.**

**BRIEF FOR AMERICAN BONDING COMPANY OF
BALTIMORE, DEFENDANT IN ERROR.**

INTRODUCTION.

This suit is to recover damages for breach of a contract by Axman to dredge for the United States a channel in San Pablo Bay, California, the contract having been annulled by the United States. When it was first tried in the Circuit Court for the Northern District of California it resulted in

a judgment in favor of the United States of America, plaintiff, for \$39,902.59 (Tr. p. 66). On writ of error to the Circuit Court of Appeals for the Ninth Circuit this judgment was reversed and the cause remanded for a new trial (Tr. p. 68). The opinion of the Circuit Court of Appeals is made a part of the Record. On the new trial the Circuit Court for the Northern District of California, in pursuance of the opinion of the Circuit Court of Appeals directed a verdict in favor of the defendant (Tr. p. 150). On writ of error to the Circuit Court of Appeals this judgment was affirmed (Tr. p. 165). The case is now before this Court on writ of error to the Circuit Court of Appeals for the Ninth Circuit (Tr. p. 177).

In order to get the facts clearly before this Court, we shall first take up the contract and what Axman did under it prior to the annulment. We shall then give a brief statement of the issues and the nature of the damages sought to be recovered, and shall follow this with a statement of the evidence introduced to prove damages.

STATEMENT OF FACTS.

Under date of August 25th, 1902, the United States called for bids for dredging in San Pablo Bay, California (Tr. p. 73). Under date of September 30th, 1902, Rudolph Axman submitted his proposal to furnish all the plant, labor and materials for dredging (Tr. p. 83). In pursuance of this proposal a written contract was entered into on November 21st, 1902, between Axman and the United States, contracting, through Colonel W. H. Heuer (Tr. p. 84). By this contract Axman agreed to do such dredging in San Pablo Bay, California, as may be required by said Heuer, in accordance with the specifications, for the sum of 11.44 cents per cubic yard (Tr. p. 85). The specifications (Tr. pp. 73-

82) were by the terms of the contract made a part thereof. Axman as principal and the American Bonding Company as his surety entered into a bond, running to the United States in the penal sum of \$50,000, dated November 21st, 1902, the condition of which is, that if Axman shall and will in all respects duly and fully observe and perform all and singular the covenants, conditions and agreements in and by said contract agreed and covenanted by Axman to be observed and performed, according to the true intent and meaning of said contract, as well as during the period of extension of said contract on the part of the United States as during the original term of the same, then the obligation to be void, otherwise to remain in full force and virtue (Tr. p. 117). The following are the important paragraphs of the specifications:

35. "The shoal to be dredged is in San Pablo Bay, California, is about five miles in length, and has a least depth of 19 feet at low water. It extends from Pinole Point to Lone Tree Point and is distant $1\frac{1}{4}$ to $1\frac{1}{2}$ statute miles N. W. of the points referred to. The average depth of the excavation is about 9 feet."

36. "The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet; a depth of 30 feet at mean low water, and a length of about 27,000 feet; to deposit the spoil as near the South shore as practicable, within lines drawn between Pinole Point and Lone Tree Point, at such places as may be designated by the Engineer Officer in charge; and to impound the material behind bulkheads or dykes of suitable construction, subject to approval by the Engineer Officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract."

56. "The location of the work to be done will be fixed in advance by the Engineer Officer in charge or his agents. Plainly marked tide gauges will be established in view of each part of the work, so that the proper depths may be at all times determined and ascer-

tained. The level of mean low water will be established before the commencement of the work, and shall not be changed during its progress. Lines will be plainly marked by stakes, range marks, pile signals, buoys, or other suitable method; and in case these marks are removed by any cause, the contractor must replace them, as provided in paragraph 53."

37. "The depth of cutting will vary from 0 to 11 feet. The mean low water depth to be obtained under this contract is 30 feet. The first cut will be made about 100 feet wide throughout the length of the shoal. All material above a depth of 30 feet must be removed. Payment will be made, however, at one-half of full contract rates, for all material shown in the final survey to have been removed from between the depths of 30 and 31 feet. Side slopes of 3 horizontal to 1 vertical will be permitted along the line of the proposed completed channel."

38. "Material dredged outside the designated lines of excavation, below the depths provided in paragraph 37, or deposited otherwise than as herein specified, directed and agreed upon, will not be paid for. The total amount to be dredged is estimated at 2,721,000 cubic yards, more or less."

40. "The part of area available for the deposit of material from scows has an average width of about $\frac{3}{4}$ of a mile. Its distance from the site of dredging varies from 1 to 2 miles, the location of the place of deposit, the depths of water therein, and the location of the dredging, are shown on maps on file in this office."

31. "The contractor will be required to commence work under the contract within sixty days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with faithfulness and energy, and to complete it within twenty-eight (28) months after the date of commencement."

30. "Payments will be made monthly, subject to the provisions of paragraph 46 of these specifications. A percentage of ten (10) per centum will be reserved from

each payment as provided for in paragraph 45 of these specifications."

45. "With the funds now available, and such as may hereafter be appropriated, payments, less than ten per centum, will be made monthly for all material removed from the cut above the grade plane, provided a satisfactory rate of progress, as described in paragraph 46 of these specifications, has been made.

"The ten per centum deductions will be made monthly until 1,400,000 cubic yards of material measured in place have been excavated, accepted and paid for; thereafter, monthly payments will be made in full without further deduction, provided satisfactory progress has been maintained. The retained percentages will not be paid until the satisfactory completion of the contract."

46. "The work must progress at the rate of at least 100,000 cubic yards per month, and to entitle the contractor to the monthly payments provided for in paragraph 30 of these specifications, an average of not less than 100,000 cubic yards per month must have been dredged and deposited; the calculation of averages to be made from the day on which the contract requires the work to be commenced."

50. "All material will be paid for by the cubic yard, measured in place. Price bid shall include all expenses of transportation, construction and maintenance of bulkheads, and disposal of the material as above provided."

34. "All available information in the possession of the United States will be given upon application. The United States will not guarantee the correctness of its information, and will not be responsible for the safety of the employees or material used by the contractor, nor for any damage done by or to them from any source or any cause. Bidders are expected to satisfy themselves as to the nature of the work to be done, and it will be assumed that the proposals are based upon thorough understanding of its character. Intending bidders are urged to visit the localities of the work and by personal inspection and inquiry fully to inform themselves as to the present and probable future conditions. No allowance or concession will be made for any lack of informa-

tion on the part of the contractor regarding the work. The price bid shall be full compensation for furnishing all necessary labor, materials and appliances of every description, and for doing all the work herein specified to the satisfaction of the engineer officer in charge, and shall include all risks and delays of whatever nature attending the execution of the work."

Paragraph 3 of the contract is as follows:

"The said party of the second part shall commence, prosecute and complete the work herein contracted for as set forth in paragraphs 31 and 46 of the attached specifications."

The contract by paragraph 15 thereof is subject to the approval of the Chief of Engineers, U. S. A. The contract was approved by General G. S. Gillespie, Chief of Engineers, U. S. A., December 27th, 1902 (Tr. pp. 65, 87); Axman was notified of such approval under date of January 3rd, 1903 (Tr. p. 88), and commenced work February 24th (Tr. p. 89).

Even after the execution and approval of the contract, however, there were certain matters to be determined by Colonel Heuer before the terms of the contract became definite and fixed. One was the designation of the dumping ground, in accordance with paragraph 36 of the specifications, and the other was the designation of the outlines of the channel to be dredged, in accordance with paragraph 56 of the specifications.

While Colonel Heuer testified that he designated the place where the bulkhead was to be built (Tr. p. 116), yet the point where the bulkhead was to be built was actually designated by Mr. Demerit, one of Colonel Heuer's assistants, Axman requesting at the time that the line or direction of the bulkhead be changed, so that it would extend out towards deeper water (Tr. pp. 88 and 145). The point from which

the bulkhead started was not the extreme outer end of Pinole Point, but very near the outer end (Tr. p. 114). Axman built a bulkhead 2400 feet long, consisting of two arms, one of 1800 feet and one of 600 feet (Tr. p. 114). The outlines of the channel were marked prior to the commencement of the work (Tr. p. 91). When the location of the bulkhead was finally determined and the channel to be dredged staked out by Colonel Heuer, the contract became a contract to dredge a channel within certain fixed lines of certain dimensions and to deposit the spoil in a certain fixed place behind bulkheads to be built by Axman, and for this work Axman was to receive 11.44 cents per cubic yard of material dredged measured in place.

Paragraphs 39 and 47 of the specifications are as follows:

39. "All dredged material is to be deposited within the limits of the area described in paragraph 36. The method of deposit will be subject to approval by the Engineer Officer in charge."

47. "The contractor will be required to provide and maintain such a plant as the Engineer Officer in charge shall deem necessary for the vigorous prosecution of the work. The plant shall be at all times subject to the inspection and approval of the Engineer Officer in charge. If deemed insufficient or inadequate, the contractor will be required to increase or change the plant to the extent found necessary. All plant and appliances must be kept in good condition in every respect. The contractor will give immediate notice in writing to the Engineer Officer in charge of the arrival upon or withdrawal from the work of any portion of his plant; provided, however, that the number of dredges may not be diminished at any time without first obtaining the consent of the Engineer Officer in charge."

Colonel Heuer was the engineer officer in charge. Axman commenced work with the dredge Caledonia, two self-dumping barges and a steamboat used to haul the barges.

This plant was approved by Colonel Heuer. During part of the time Axman with the approval of Colonel Heuer, employed the dredge Oakland for the purpose of dredging a channel into the place of deposit and a sump in order that he might get his barges in behind the bulkhead, and to make room for dumping more material there and distributing it over the basin (Tr. p. 115). Colonel Heuer described the dredger Caledonia as a clam shell dredger, which would probably lift from 10 to 15 tons at one time, and when allowed to sink in the earth would go down from six to ten feet, depending on the nature of the bottom; so that when the contractor was dredging where the deposit of material was about one foot thick, that is, where the depth of the water was 29 feet and the bucket sank six feet, then the measurements would show but one foot, for which the Government agreed to pay in full and one foot for which the Government agreed to pay one-half, and would not take into account the four feet below. This dredger was also used by Axman's successor and during that time actually dredged on an average of 71,590 cubic yards monthly of paid materials (Tr. p. 117).

Axman worked from February 24th to June 24th, 1903, during which time he removed less than 100,000 cubic yards. On June 24th the dredger Caledonia was removed for repairs with the permission of Colonel Heuer. She was not returned until October 1st. During the time she was away there was no dredging done (Tr. pp. 92, 115). The reason why she was removed was to place in her another fleeting spud, in order that she could fleet against the strong ebb tide; although the dredging machine had the best fleeting device known at that time to the dredging science, the current was too strong for her (Tr. p. 129). Axman afterwards worked from October 1st to December 24th, 1903. During these nine months he removed 196,000 cubic yards, and during no month did he remove 100,000 cubic yards (Tr. p. 91). Ax-

man's explanation of this lack of progress was that the only way to do the work was the method he had adopted; that the dredger had a capacity of at least 100,000 cubic yards per month; that the barges drew about eight feet of water and these were towed from the dredger to the dumping ground by the steamer; that the greatest depth of water behind the bulkhead was four feet, and only a small area was that deep. The consequence of this was that the barges could only get behind the bulkhead at high tide, which occurred twice in every twenty-four hours, and thereby the work was retarded; that he tried using the dredge Oakland for the purpose of dredging a channel in behind the bulkhead, and of dredging a sump or hole into which to dump the material; that in order to remedy the difficulty he requested Colonel Heuer to allow him to dump on the north side of the channel or down at "The Sisters", at the same price and under the same contract. "The Sisters" was the place where the material was subsequently dumped, under the contract with the North American Dredging Company; that he first requested to be allowed to dump the material outside of the bulkhead and employ an additional clam shell dredger to lift it over. He also wanted to employ a suction dredger so as to spread the material over a large territory. Both of these requests were refused. He requested in October or November of 1903 to be allowed to dump the material at "The Sisters"; that Colonel Heuer said to him: "I will not allow you to dump any place else, and if you do I will not pay you a cent for anything;" that because he could only get behind the bulkhead at high water he got two additional barges of 1,000 tons capacity each; that sometimes he would only load the barges half full, so as to try and get behind the bulkhead; that by reason of the stormy weather the steamer could not handle the barges, and so he had to get a propeller boat to bring the barges over to the stern wheeler, but the propeller boat drew too much water to go behind the

bulkhead (Tr. pp. 126-130). Colonel Heuer testifies that probably twelve hours out of twenty-four the water was of sufficient depth to get behind the bulkhead (Tr. p. 147).

Paragraphs 4 and 5 of the Contract are as follows:

4. "If in any event the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the Engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party or parties, or either of them, of the second part, and upon the giving of such notice all payments to the party or parties of the second part, under this contract, shall cease, and all money or reserve percentage due, or to become due, the said party or parties of the second part by reason of this contract shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done, and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by said United States in excess of those payable by said United States during the period herein allowed for the completion of the contract by the party of the second part, and the party of the first part may deduct all the above mentioned sums out of or from the money or reserve percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials by contract or otherwise in accordance with law."

5. "It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said party of the first part and deducted from any payments due or to become due the party of the second part; provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual froshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restriction, or other unforeseeable causes of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work, or delivering the materials within the period required by the contract, but such waiver of the time and remission of the charges shall in no other manner affect the rights or obligations of the parties under this contract."

Paragraph 48 of the specifications is as follows:

"If at any time after the date set for beginning work it shall be found that the required minimum rate of progress is not being maintained, the Engineer Officer in charge shall have the power, after due notice in writing to the contractor, to employ such additional plant or purchase such materials as may be necessary to ensure the completion of the work within the time specified, charging the cost thereof against such sums as may be

due or become due to the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract as provided for in the form of contract to be entered into."

Under the terms of the contract, therefore, Colonel Heuer could have pursued one of these three courses for a failure to prosecute the work. He could annul the contract or extend the time for completion or employ additional plant at the expense of Axman.

Colonel Heuer testified in his examination in chief (Tr. p. 90), that he arrived at the opinion that Axman was not carrying out his contract, which required at least 100,000 cubic yards per month excavation, that Axman worked nine months and got out less than 200,000 cubic yards; that he acted under paragraph 4 of the contract because Axman was not proceeding faithfully and diligently to carry out the work.

Letters were sent Axman and the American Bonding Company, notifying them of the annulment under date of December 24th, 1903 (Tr. pp. 90 and 91). The one to Axman is in the following words:

"I hereby notify you that the contract entered into by you with me on November 21st, 1902, for dredging in San Pablo Bay, California, is this day annulled, as provided for in paragraph 4 of the contract, on account of failure to comply with the requirements of the specifications."

ISSUES.

The complainant and the amendments thereto will be found in Tr. pp. 2-5; 49-65. In it the contract and specifications are set forth in full, as is also the execution and delivery of the bond.

By paragraph 5 of the complaint the following is alleged:

That Axman entered upon the performance of his contract and proceeded to do a portion of the work contracted for; that he did fail to prosecute faithfully and diligently or at all the work in accordance with the specifications and requirements of said contract; that he did refuse to complete or perform the work or any further part thereof; that he did abandon said contract and refuse to do the work or any part thereof; that Colonel Heuer annulled the contract; that he re-advertised the work; that he contracted with the North American Dredging Company to do the work left undone by Axman, and paid it the sum of \$311,991.29; that the cost of the same work at the price for which Axman contracted to do it would have been \$246,490.35, a difference of \$65,500.94. Damages are claimed for this last mentioned sum against Axman and to the extent of \$50,000 against the Bonding Company.

The defendants by their respective answers (Tr. pp. 14 and 32), not only specifically deny all these allegations of the complaint, but they allege that the work done by the North American Dredging Company was not the work that Axman had contracted to do. As there was no evidence to support the allegation that Axman had failed to prosecute the work at all, or that he refused to complete or perform the work, or that he abandoned the contract, and as the evidence showed that Colonel Heuer had annulled the contract, under the power given him by paragraph 4, because Axman had not dredged 100,000 cubic yards per month, and as the defendants admitted that the United States paid the North American Dredging Company \$65,000 more than it would have paid Axman, had he completed his contract (Tr. p. 112), it is only necessary to discuss one issue, and it may be stated as follows:

Was the work re-advertised and was a contract made with the North American Dredging Company to do the work left undone by Axman?

In order to prove this issue the plaintiff proved that the contract was annulled with the assent of General Gillespie, Chief of Engineers, with instructions from him, as follows:

"The work should be re-advertised and a careful account kept of any increased cost or loss and damage to the United States by reason of the contractor's failure to complete the original contract." (Tr. p. 89-90.)

The work was re-advertised and new bids opened on March 2nd, 1904. It was found, however, that the lowest bidder did not agree to dump the material behind the line extending from Point Pinole to Lone Tree Point, and while the other bidders agreed to dump behind the bulkhead the prices were extortionate. So all bids were rejected (Tr. p. 92).

The plaintiff then offered in evidence the contract between the United States and the North American Bonding Company, to which was attached the advertisement for sealed proposals, the bid of the Dredging Company and the specifications on which the bid was based.

This evidence was received over the objection of the defendants, the question of its admissibility being reserved (Tr. pp. 92-108).

It appears from this evidence that on April 21st, 1904, Colonel Heuer advertised for sealed proposals for dredging in San Pablo Bay (Tr. p. 93), and that the new specifications are the same as Axman's specifications, except in the following particulars:

Paragraph 36 of the new specifications is as follows (Tr. p. 98):

"The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 2,700 feet, and either:

"(a) To deposit the spoil as near the South shore as practicable, within lines drawn between Pinole Point and Lone Tree Point, at such places as may be desig-

nated by the Engineer Officer in charge; and to impound the material behind bulkheads of suitable construction, subject to approval by the Engineer Officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract; or

“(b) To deposit the spoil in water exceeding 50 feet in depth lying within the area bounded by lines drawn from The Sisters to Point San Pablo, thence to Marin Islands, and thence back to The Sisters. The top of any pile shall not be higher than 40 feet below the level of low tide.

“Bids will be received for either place of deposit, but will not be considered for any other place of deposit than those specified, and bidders must distinctly state in their bid, in which place they propose to deposit the spoil. The right is reserved to award the contract, irrespective of price, for such place of deposit as may be considered most advantageous to the United States.”

Paragraph 37 of the new specifications is as follows:

“A part of the channel near its southwest end, having a length of 8,000 feet, a width varying from 70 to 140 and a depth of 30 feet below mean low tide level, containing approximately 165,000 cubic yards, was dredged recently under a former contract which was annulled. The area over which dredging was done, which can be seen on a map on file in this office, will not require re-dredging unless filling occurs above the grade plane, and then only such material as fills above said grade plane before the completion of the contract will have to be re-dredged and deposited at the unit price per cubic yard, place measurement, mentioned in the new contract.”

Paragraph 41 of the new specifications is as follows:

“In place of deposit (a) the part of the area available for deposit of material from scows has an average width of about $\frac{3}{4}$ of a mile. Its distance from the site of dredging varies from 1 to 2 miles.

"In place of deposit (b) the deep part of the area available for the deposit of material from scows is triangular in shape, covering an area of about one square mile. Its distance from the nearest point of the dredging is about 5 statute miles. The location of the places of deposit, the depth of water therein and the location of the dredging are shown on maps on file in this office."

By paragraph 31 of the new specifications the contractor was only given 23 months to complete, while Axman had 28.

While paragraphs 42 and 45 of the new specifications differ from paragraphs 41 and 44 of the old specifications, the difference need not be noted here.

So that under the new specifications it appears the new contractor was to base his bid on dumping the material either behind lines drawn between Pinole Point and Lone Tree Point or at "The Sisters", at which latter point Axman had requested that he be allowed to dump material, which request was refused by Colonel Heuer.

It further appears from the evidence that on May 24th, 1904, the North American Dredging Company bid only on depositing the material at "The Sisters" at the price of 14.48 cents per cubic yard (Tr. p. 104); that on June 21st, 1904, the new contract was entered into (Tr. p. 105); that it was approved by General Mackenzie, Chief of Engineers, July 19th, 1904 (Tr. p. 108), and that it is similar in all respects to the Axman contract, except that it provides that the spoil is to be deposited in the place of deposit (b) as described in paragraph 36 of the new specifications, which are made a part of it. The bid of the Dredging Company was the lowest received (Tr. p. 114).

To further prove this issue, the opinion evidence of six witnesses was offered (Tr. pp. 110-112, 114, 119-121) as to the fairness of the price paid the North American Dredging Company, and as to whether or not it would cost more to

dredge and dump the material behind the line drawn between Pinole Point and Lone Tree Point than to dredge and dump in deep water. One witness thought that 14½ cents was a fair price, and another that 15½ cents was a fair price for dredging and dumping in deep water. Colonel Heuer thought 14.48 cents was a fair price, and while there was a consensus of opinion that it would cost more to dredge and dump under the new specifications at the points named than to dredge and dump in deep water, the witness who thought that 15½ cents was a fair price, thought that it would cost one cent more to dump at the points named, while another thought that the difference in cost would be four cents. It will be noted that not one of these witnesses was asked whether it would cost more to deposit behind the bulkheads built by Axman than to dump in deep water; nor was any bidder told in the specifications that Axman had built a bulkhead behind which the spoil could be dumped.

All of the above opinion evidence was received by the Court, over the objection of the defendants, the question of its admissibility being reserved.

At the end of the case the Court ruled out all of this evidence to which the question of admissibility had been reserved, and instructed the jury to render a verdict for the defendant (Tr. pp. 149-150).

ERRORS ASSIGNED.

While by reason of the aforesaid rulings of the Court there are twenty errors assigned (Tr. pp. 167-175), they are, in reality, together with the reasons therefor, all included in the statement of the 19th, which is as follows:

“The evidence excluded shows there was no material difference between the two contracts involved; that the work completed was the same improvement, and that

the only variation from the original contract was in a respect merely incidental to its main purpose and concerned the mere depositing of the debris resulting from the work. Such evidence also showed the method of depositing the spoil allowed under the second contract greatly reduced the cost of the work."

ARGUMENT.

I.

THE CONTRACT AND SPECIFICATIONS EXCLUDED DID NOT TEND TO PROVE THE ISSUES.

Under the Axman contract (specifications paragraph 36), the "work to be done" by Axman is specifically described. It is to excavate a channel and to deposit the spoil as near the south shore as practicable within lines drawn between Pinole Point and Lone Tree Point and to impound the material behind bulkheads to be built by him. Inasmuch as this bulkhead was built in part at least, it follows that the work left undone by Axman was the excavation of this channel and the deposit and impounding of the spoil behind the bulkhead.

Colonel Heuer, when he came to re-advertise the work notified bidders by paragraph 36 of the new specifications, that the "work to be done" was one of two things: To excavate a channel and *either* to deposit the spoil as near the south shore as practicable within lines drawn between Pinole Point and Lone Tree Point and to impound the material behind a bulkhead to be built and maintained by the new contractor, *or* to deposit the spoil in water exceeding fifty feet in depth lying within the area bound by lines drawn from The Sisters to Point San Pablo, thence to Marin Island, and thence back to The Sisters, and he provided in this para-

graph that bids would be received for either place of deposit, but he specifically reserved the right to award the contract, *irrespective of price*, for such place of deposit as may be considered most *advantageous* to the United States. Notice was further given by paragraph 37 that approximately 165,000 cubic yards of the channel had been dredged.

When, therefore, Colonel Heuer contracted with the North American Dredging Company that it should dredge the channel and deposit the material at "The Sisters", he did so solely because this place of deposit was more advantageous not to the parties, but to the United States alone. In so contracting he abandoned the work left undone by Axman, and substituted for it work in no sense substantially the same, but materially different. It, therefore, follows that the work to be done under the new contract was not the work left undone under the old contract and that the new contract did not tend to prove the issues.

Nor did the evidence excluded tend to prove that the work was re-advertised. The terms of Axman's contract only became fixed when Colonel Heuer had designated the outlines of the channel and the line of the bulkhead. When this was done, his contract was to dredge a defined amount of material, build and maintain a bulkhead and deposit the material behind the bulkhead. For the dredging, depositing and building the bulkhead, he was to receive a fixed price. There necessarily entered into this price the cost of building and maintaining this bulkhead, as well as the cost of dredging and depositing the material. As the necessary bulkhead had been built, at least in part, it was not necessary for the new contractor to build a new bulkhead. So far as the bulkhead had been built, the work was completed. In re-advertising, however, Colonel Heuer, in the new specifications, does not call the bidders' attention to this fact, but re-advertises for bids requiring the building of a new bulkhead. It is, therefore, submitted that the work was not re-advertised.

The plaintiff has based its suit on the allegations that it re-advertised and did the work left undone by Axman, and it claims the alleged excess cost of doing that work. The only question, therefore, is, did it do the work left undone, and there is no room for the further question as to whether if it did something else these defendants were damaged, or as to whether the changes made were material or immaterial. As the work left undone by Axman was neither re-advertised nor re-let, it is submitted that the evidence in question was properly excluded under the pleadings, and that there can be no recovery.

II.

THE CONTRACT FIXED THE METHOD OF PROVING DAMAGES AND THE EVIDENCE EXCLUDED WAS NOT ADMISSIBLE UNDER THAT METHOD.

It is contended by the plaintiff in error, using the language of its nineteenth assignment of error

“that the evidence excluded shows that there was no material difference between the two contracts involved; that the work completed was the same improvement, and that the only variation from the original contract was in a respect merely incidental to its main purpose, and concerned the mere depositing of the debris resulting from the work.”

In other words, the contention is that the evidence excluded shows that the main purpose of the Axman contract was the acquisition of a completed channel, and that the change in the method of acquiring the channel was an immaterial change; that it was immaterial whether the contractor dumped behind the bulkhead built by Axman two miles away or in deep water five miles away. This contention is made,

notwithstanding the further contention that the evidence shows that this change made a difference in cost of from one to four cents per cubic yard.

We deny, however, that the main purpose of the Axman contract was the acquisition of a completed channel and that the changes were immaterial.

On the contrary, the main purpose of the contract was not only the digging of the channel, but the disposition of the spoil in such a way that it would not interfere with navigation; it must have been this, otherwise the disposition of the spoil would have been left to the discretion of the contractor. (See testimony of Colonel Heuer, Tr. p. 147.) That the disposition of the spoil was a material provision of the contract and one of its main purposes is shown by the fact that Colonel Heuer would allow Axman neither to dump the material outside of the bulkhead and then lift it over, nor to use a suction dredger to spread it out over a large territory, from the fact that paragraph 38 provided that material deposited otherwise than as specified will not be paid for, from the fact that under paragraph 42 of the new specifications, a disposal of the spoil other than at The Sisters rendered the contract liable to be annulled, and lastly from the fact that the place of deposit was more important than the price to be paid, for Colonel Heuer reserved the right in re-letting the work, to award the contract *irrespective of price* for such place of deposit as may be considered most *advantageous* to the United States. It is, therefore, submitted that the change was a material one.

The test of the liability of the defendants, however, is not to be measured by the question as to whether or not the main purpose of the contract was the dredging of the channel. The test is whether or not the work done by the North American Dredging Company was the work which Axman had left undone.

U. S. vs. McMullen, 222 U. S. 460.

In that case a contract was let for dredging, the Government reserving the right to deposit the spoil either at the Government station or in deep water, it being contemplated that a part would be deposited at the station and a part in deep water. The first contractor defaulted and the work was re-let, but the same amount of dredging was not done until the second contract as was contemplated should be done by the first.

The first contractor and his surety defended on this ground.

This Court first pointed out that the amount of work to be done depended on the appropriation, and on page 472 laid down the principle as follows:

“Whether the object of the contract was attained is immaterial, so long as the work done towards it was work that the first contractor had agreed to perform.”

Again it is contended by the plaintiff using the language of the 19th assignment of errors:

“Such evidence also showed the method of depositing the spoil allowed under the second contract greatly reduced the cost of the work.”

Did the evidence excluded show this?

The attention of the expert witnesses who went on the stand was called solely to the new specifications, and their testimony was that it would cost more to do the work under those specifications within twenty-three months, if the dumping ground was behind a bulkhead to be built and maintained by the contractor between the points named, than if the dumping ground was at “The Sisters”.

Axman testified that he could get behind the bulkhead only at high tide, and Colonel Heuer admits that it was only possible to get behind the bulkhead twelve hours out of the twenty-four. Under these circumstances, a shortening of the time for completing the work would necessarily increase the cost thereof. If it would have cost Axman at the time he

took the contract the same amount to dump at the points named two miles off as at "The Sisters" five miles off, yet when the new contractor was not only required to build a new bulkhead, but his time was shortened, it would make a difference in cost in favor of the five-mile spot over the two-mile spot. It is submitted that this evidence, therefore, did not show that the method of depositing the spoil under the second contract greatly reduced the cost of the work and was properly excluded.

If this evidence did show that the cost of the work was reduced that fact is a mere fortuitous incident herein for the re-letting was not on the basis of cost, but on the advantage of one dumping ground over the other.

Now if this evidence was admissible, the underlying principle on which it could be admitted was not that it showed that the work cost less, but that inasmuch as the work had been changed, the plaintiff was entitled to show the relative cost of the two works at the time of re-letting, in order to arrive at its damages. If such evidence is admissible, it would make no difference whether the witnesses had testified that it cost more to dump at The Sisters than at Point Pinole or that it cost less. If they had testified that it cost more, however, then the plaintiff would have had to go one step further and show how much more, so as to show its damage. If this evidence is admissible on behalf of the plaintiff, then Axman would have been entitled to show by experts the relative cost of doing the work in the two ways. If the case had gone to the jury under the evidence, then, as Axman testified that he offered to dump at The Sisters for 11.44 cents, it would have been within its province to say whether he should be mulcted to the extent of \$65,000 more than the amount for which he had offered to do the work, as the jury might have found that 11.44 cents was a reasonable price.

The question, therefore, to be solved, is whether or not the parties intended that the damages, in case of annulment,

should turn on the question of expert testimony as to the relative cost of dumping at The Sisters and at Point Pinole, or should be solved by at least a substantial if not an actual doing of the work left undone. In arriving at their intention, it is necessary to consider the terms of the contract and to keep in mind that as this contract was drawn by the plaintiff in error, any ambiguity in its terms must be solved most strongly against it.

In the case of *United States vs. O'Brien*, 220 U. S. 321, this Court had before it the construction of a contract prepared by the plaintiff in error. In that case the contract was annulled under its terms because the contractor failed to prosecute the work faithfully and diligently. It was provided by that contract that the penalty for such failure was the forfeiture of the money due, or to become due under it, and the United States was given the right to do the work by contract. In a later paragraph of that contract, it was provided that in case of failure to complete the contract as specified and agreed upon, the sums due or to become due should be forfeited, and that the United States also should have the right to recover any excess in completing it.

The contract having been annulled for a failure to prosecute the work faithfully and diligently, the contention was made that the Government had the right to recover the excess cost. This Court held the Government to the terms of its contract, deciding that it was only entitled to retain the sums due or to become due, first, because the failure to prosecute was not a failure to complete under the later paragraph, and, secondly, because under the earlier paragraph the United States had not provided in plain terms that it was entitled to the excess cost.

Since that decision and evidently in order to overcome the difficulty met therein, the government has changed the form of its contracts, so that in this contract it is provided by paragraphs 4 and 5 that in case of a failure to begin on time

or to prosecute the work faithfully and diligently, or to complete within the contract time, the contract may be annulled; and while in the O'Brien case, a failure to prosecute the work faithfully and diligently was not made a breach of the contract, the Government in the present form of contract, makes such failure a breach by providing in paragraph 3 that Axman shall dredge at the rate of 100,000 cubic yards per month.

By the terms of paragraph 2 of the present form of contract, the decision of Colonel Heuer as to the quantity of the work done, is made final. The contract, however, does not leave to his judgment the question of what is a diligent performance, as was done in the O'Brien contract. Under the terms of paragraph 2, Colonel Heuer decides how much, in his opinion, has been done in any one month; his decision on this question is final, but if he decides that less than 100,000 cubic yards has been done, the contract itself provides (paragraph 3) that that is not a diligent performance, so that under the present form of contract the penalty is the same, whether the contractor fails to begin on time, whether he fails to complete on time or whether he fails to prosecute the work faithfully and diligently in so far as the rate of performance is concerned.

Now, by paragraph 4 of the present contract, if the contract is annulled because 100,000 cubic yards per month is not dredged, Colonel Heuer is given the right in the first place to retain the sums due Axman until the "final completion and acceptance of the work stipulated to be done". This can mean but one thing, and that is that the plaintiff in error could not abandon the completion of the work and retain the sums or a part thereof, as damages for non-completion, but it must, if it desires to obtain such damages, complete the work in order to ascertain it. This paragraph further provides that the plaintiff in error shall have the

right to recover from Axman the sums expended by Colonel Heuer "in completing the contract," in excess of the sums stipulated to be paid Axman, together with certain costs and expenses, and evidently in order to determine the excess, this paragraph authorizes Colonel Heuer "to secure the performance of the work by contract". In pursuance of this paragraph the Chief of Engineers directed Colonel Heuer to re-advertise the work and keep a careful account of any increased cost. Axman, therefore, agreed to pay this excess, and the bonding company guaranteed that he would do so. Now, the parties to the contract must be deemed to know the legal effect of these provisions of paragraph 4. If Colonel Heuer, instead of accepting the bid of the North American Dredging Company for dredging the channel and depositing the debris at The Sisters, had accepted the lowest bid of some other person to dredge the channel and deposit behind the bulkhead built by Axman, then Axman contracted that he would pay any excess cost. Such excess not only would have needed no evidence on the part of the plaintiff in error to support its reasonableness (U. S. vs. McMullen, 222 U. S. 460), but Axman would not have been permitted to show that it was not reasonable. (Baer vs. Sleicher, 163 Fed. 129.)

So that is it not perfectly plain that the parties intended, or rather we should say that Axman and his surety had the right to assume that the plaintiff intended that by the terms of paragraph 4, the damage should be determined by the doing at least substantially of the work left undone by Axman, and not by the doing of some other work coupled with speculative testimony as to relative cost.

We submit that it is, and that the new contract specifications and expert evidence were properly excluded.

III.

We would end this brief here, if it were not for a question which was raised by the plaintiff in error in the lower Court and which will probably be raised here. It is to this effect, if we properly understand it: The contract permitted a change in the dumping ground, while Axman was prosecuting the work, and this change could be made after annulment so as to bind the surety.

WE MUST, THEREFORE, TAKE UP THE QUESTION: DID THE CONTRACT PERMIT A CHANGE IN THE DUMPING GROUND UNLESS AXMAN AGREED TO IT, SO AS TO BIND THE SURETY? IF SO, COULD THE CHANGE BE MADE AFTER ANNULMENT?

The right of the Government to make changes in its contract, so as to hold the surety has been before this Court in several cases.

In the McMullen case (222 U. S. 460) the contract before this Court was one for dredging a channel. The place of depositing the spoil was left entirely to the discretion of the engineer in charge and the amount of dredging was not fixed, the contract was annulled and the work re-let at an increased cost. The question before this Court was whether an extension of time granted the original contractor had released his surety. This Court held that there was no prohibition as to making changes so as to bind the surety, and that the question as to the right to make a change depended on the provisions of the contract construed in the light of the intention of the parties.

In the Freel case (186 U. S. 309), the contract provided that changes could be made in the plans and specifications for building a dry dock. This Court held that while certain changes could be made, the right did not contemplate the change of the site of the dry dock and that such a change released the surety.

There are only two provisions in the Axman contract dealing with changes. The first is paragraph 6 of the contract and the other is paragraph 58 of the specifications.

Paragraph 6 of the contract is as follows:

"If at any time during the prosecution of the work it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether for labor or material as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reason for such change and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect it must be approved by the Secretary of War; provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred."

The meaning of this paragraph is evidently this:

No change can be made except by mutual agreement between Colonel Heuer and Axman. We say this, because while the Government reserves the right to make changes, Axman cannot be compelled to carry out the change, unless the cost is satisfactory to him, as there is no provision by which the cost is fixed. Before, however, such a mutually agreed change becomes binding at least on the Government, it must be reduced to writing, executed by the parties and approved by the Secretary of War. So that no change to which Axman did not agree would bind his surety.

Paragraph 58 of the specifications is as follows:

"The right is reserved to make such minor changes in these specifications as may be necessary or expedient to carry out the intent of the contract, and no increase in price shall be paid the contractor on account of such changes, except as provided in the form of contract to be entered into."

Now, it will be noted that the Government under the latter paragraph does not reserve the right to make changes in the specifications, but only the right to make minor changes, and even then only such changes as are necessary to carry out the intent of the contract. The intent is to dredge a channel, build a bulkhead and deposit the spoil behind it, and this provision of the specifications only authorizes such minor changes therein as will accomplish the dredging of the channel, the building of the bulkhead and the deposit of the spoil behind it. Even supposing, however, that the intent is simply to dredge a channel, the question then arises as to what is a minor change, the argument being, of course, that a change of the dumping ground is a minor change; but the question immediately occurs, "Why call it a minor change, when it comprises the most important part of the work outside of the actual dredging? Why put such a change on a par with a change in the provision as to furnishing stakes, buoys, piles, etc., under paragraph 53 of the specifications? If the change of the dumping ground is a minor change, then we submit that no change could be other than a minor one, and that, therefore, this paragraph of the specifications would receive the same construction as if the word minor had been omitted therefrom. Adopting the thought of this Court as expressed in the O'Brien case (220 U. S. 328), we submit that the contract as drawn by the plaintiff in error does not show technical accuracy enough to give this contention of the plaintiff in error any weight, and we submit that this paragraph of the specifications did not authorize a change of the dumping ground.

There is no room, however, for contending that the change with reference to the deposit of the spoil was immaterial, because the parties had expressly contracted that it should be material. This is made evident by the circumstance that paragraph 38 expressly provides that material deposited otherwise than as specified would not be paid for, and by para-

graph 42 of the new specifications that a disposal of the spoil other than at "The Sisters" rendered the contract liable to be annulled.

Paragraph 58 further provides, "No increase in price shall be paid the contractor on account of such changes, except as provided in the form of contract to be entered into"—that is, as provided in paragraph 6.

It therefore follows that no change, whether minor or otherwise, can be made so as to bind the surety, except by the mutual agreement of Colonel Heuer and Axman. Nor would such a change become operative until reduced to writing and approved by the Secretary of War. As Axman never agreed to the changes made at the price fixed, neither he nor his surety were bound by them. But beyond this, and even if the Government has absolute right to make changes, the change was not made under the contract, but outside of it. When Colonel Heuer annulled the contract he put an end to all its terms and provisions, except those applicable to his rights in case of default, those giving him the right to relet the contract and charge Axman with the loss.

He, therefore, put an end to his right to make changes in the work to be done.

It is, therefore, submitted that the changes made did not bind either Axman or his surety.

We have just received a copy of the brief of the plaintiff in error. Under the statement of the point at issue, the question which we have just discussed becomes immaterial, as the contention is not made.

Respectfully submitted,

JESSE W. LILIENTHAL,
EDWARD DUFFY,

*Attorneys for American Bonding Company of
Baltimore.*

UNITED STATES OF AMERICA v. AXMAN.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT.

No. 242. Argued March 9, 1914.—Decided May 25, 1914.

Where, after default of the original contractor, the contract is relet, the original contractor is not bound for difference unless the contract as relet is the same as the original contract.

Where a contract for dredging requires the dredged material to be deposited in a specified location, changes made as to the location for depositing such materials amount to such an important variation that the first contractor cannot be held for difference. *United States v. McMullen*, 222 U. S. 460, distinguished.

Change in location for depositing material dredged under a government contract is not to be regarded as a minor change; it is clearly an important one.

193 Fed. Rep. 644, affirmed.

THE facts, which involve the rights and liabilities of a contractor and his surety under a contract with the Government, are stated in the opinion.

The Solicitor General for the United States:

After the annulment of the contract by reason of the contractor's default it became the duty of the Government to complete the work at reasonable cost and to diminish

234 U. S.

Argument for Appellee Axman.

as far as possible the loss which it had suffered and for which it proposed to hold the defendants liable.

The change which was made in the terms was to the manifest ease of the defendants and lessened the cost of the work as relet without increasing in any particular the burden which either the principal or the surety had assumed.

Where the Government relets a contract, the sureties—and *a fortiori* the principal—are not relieved because there are differences in the terms which diminish the cost of the work as relet. See *United States v. McMullen*, 222 U. S. 460, which is controlling and decisive of the case at bar, in fact, the similarity of incident and issues is unique. This decision followed in time the first opinion of the Circuit Court of Appeals herein, and it may fairly be assumed that the latter court was as yet unadvised of it at the time of its final action.

Mr. Frank W. Aitken, with whom *Mr. John R. Aitken* was on the brief, for appellee Axman:

The action is not for damages, but is on a contract to pay the cost of certain work.

There can be no recovery except for completing the work.

The change made was material; the Government did not proceed to complete the contract, but did other work instead.

The contractor's rights after annulment are subject to the same rules as those of a surety.

The change was detrimental and new obligations were imposed.

The contract did not authorize such change unless made by agreement.

In support of these contentions, see *Alcatraz Masonic Ass'n v. U. S. F. and G. Co.*, 85 Pac. Rep. 157-8; *Am. Bonding Co. v. United States*, 167 Fed. Rep. 910; *Am. Bonding Co. v. Gibson County*, 127 Fed. Rep. 671; *American*

Surety Co. v. Woods, 105 Fed. Rep. 741; *S. C.*, 106 Fed. Rep. 263; *Axman v. United States*, 47 Ct. Cl. 537; *S. C.*, 48 Ct. Cl. 376; *Burnes v. Fidelity Co.*, 96 Mo. App. 467; *Calvert v. London Dock Co.*, 2 Keen, 638; *Chesapeake Co. v. Walker*, 158 Fed. Rep. 850; *Durrell v. Farwell*, 88 Texas, 98; 30 S. W. Rep. 539; *Holme v. Brunskill*, L. R. Q. B. Div. 495; *Prairie Bank v. United States*, 164 U. S. 227; *Miller v. Stewart*, 2 Cr. 700; *O'Connor v. Bridge Co.*, 27 S. W. Rep. 251, 983; *Reese v. United States*, 9 Wall. 13; *Reissaus v. White*, 106 S. W. Rep. 607; *State v. Medary*, 17 Oh. St. 565; *Taylor v. Johnson*, 17 Georgia, 521; *United States v. Corwine*, Fed. Cases, No. 14,871; *United States v. Freel*, 92 Fed. Rep. 306; *United States v. Freel*, 186 U. S. 309; *United States v. Freel*, 99 Fed. Rep. 239; *United States v. McMullen*, 222 U. S. 460; *United States v. O'Brien*, 220 U. S. 321; *United States v. Robeson*, 9 Pet. 319, 327; *White v. Sisters of Charity*, 79 Ill. App. at 649.

Mr. Edward Duffy, with whom *Mr. Jesse W. Lilienthal* was on the brief, for appellee American Bonding Company:

The contract and evidence excluded did not tend to prove issues.

The contract fixed method of proving damages.

No change could be made after annulment. See *Baer v. Sleicher*, 163 Fed. Rep. 129; *United States v. Freel*, 186 U. S. 309; *United States v. McMullen*, 222 U. S. 460; *United States v. O'Brien*, 220 U. S. 321.

MR. JUSTICE DAY delivered the opinion of the court.

Suit was brought by the United States to recover on a contract between the United States and Axman with the American Bonding Company, as surety, for dredging in San Pablo Bay, California. The first trial resulted in a judgment for the United States, which was reversed by the Circuit Court of Appeals for the Ninth Circuit. 167 Fed.

234 U. S.

Opinion of the Court.

Rep. 922. On new trial judgment directed in favor of the defendants was affirmed by the Circuit Court of Appeals (193 Fed. Rep. 644), and the case is brought here.

It appears that on the twenty-fifth of August, 1902, the United States called for bids for dredging in San Pablo Bay. On September 30, 1902, Axman submitted his proposal to furnish all the plant, labor and materials for the work. On November 21, 1902, a written contract was entered into between Axman and the United States for the work. Axman was to do such dredging in the Bay as might be required by the Government engineer in accordance with certain specifications for the sum of 11.44 cents per cubic yard. The specifications, which were made a part of the contract, contained, among others, the following paragraphs:

"35. The shoal to be dredged is in San Pablo Bay, California, is about five miles in length, and has a least depth of 19 feet at low water. It extends from Pinole Point to Lone Tree Point, and is distant $1\frac{1}{4}$ to $1\frac{1}{2}$ statute miles N. W. of the points referred to. The average depth of the excavation is about 9 feet.

"36. The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet; to deposit the spoil as near the south shore as practicable, within lines drawn between Pinole Point and Lone Tree Point, at such places as may be designated by the Engineer officer in charge; and to impound the material behind bulkheads or dykes of suitable construction, subject to approval by the Engineer officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract.

"39. All dredged material is to be deposited within the limits of the area described in paragraph 36. The method of deposit will be subject to approval by the Engineer officer in charge.

"31. The contractor will be required to commence work under the contract within sixty days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with faithfulness and energy, and to complete it within twenty-eight (28) months, after the date of commencement.

"46. The work must progress at the rate of at least 100,000 cubic yards per month, and to entitle the contractor to the monthly payments provided for in paragraph 30 of these specifications, an average of not less than 100,000 cubic yards per month must have been dredged and deposited; the calculation of averages to be made from the day on which the contract requires the work to be commenced."

A place for the building of the bulkhead was designated in accordance with paragraph 36 of the specifications, and Axman built a bulkhead 2400 feet long, consisting of two arms, one of 1800 feet and one of 600 feet. The outlines of the channel to be dredged were also indicated. Axman began work and continued intermittently until December 24, 1903, up to which date he had removed 196,000 cubic yards, but had not in any month removed 100,000 cubic yards. It appears that the barges in Axman's outfit were of such draft that they were unable to get behind the bulkhead except at high tide; that he applied to the engineer officer in charge to be allowed to dump the spoil on the north side of the channel or down at "The Sisters," but permission was refused him so to do. This place is the one where the material was subsequently dumped when the contract was relet.

Paragraph 4 of the contract provides:

"4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the Engineer in charge, fail to prosecute faithfully and diligently the

234 U. S.

Opinion of the Court.

work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successors legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part, under this contract, shall cease, and all money or reserve percentage due, or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part, and the party of the first part may deduct all the above mentioned sums out of or from the money or reserve percentage retained as aforesaid; and upon the giving of the said notice, the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials by contract, or otherwise, in accordance with law."

There are other paragraphs permitting the Chief of Engineers, if he sees fit, to employ additional plant or purchase materials, etc., to insure the completion of the work within the time specified, charging the cost thereof to the contractor, such provision, however, not to be construed so as to affect the right of the Government to annul the contract. The Government, on the ground that Axman

had failed to comply with the requirements of the specifications, proceeded under the provisions of paragraph 4, wherein it will be seen it was stipulated that the United States might have the right to recover from the party of the second part whatever sums might be expended by the party of the first part in completing the contract.

When the contract was relet it was advertised in the alternative, giving the contractor the right to deposit spoil where Axman was required to deposit it within lines drawn between Pinole Point and Lone Tree Point at such places as might be designated by the engineer officer and to impound the material behind bulkheads of suitable construction, subject to the approval of the engineer officer, to be built and maintained at the expense of the contractor, or to deposit the spoil in water exceeding 50 feet in depth lying within the area bounded by lines drawn from The Sisters to Point San Pablo, thence to Marin Islands, and thence back to The Sisters. The bid accepted and the contract made provided for the deposit of the spoil in deep water at The Sisters. At the trial the Government offered evidence of witnesses as to the fairness of the price paid the North American Dredging Company, the new contractor, under the relet contract and as to whether it cost more to dredge and dump the spoil behind the line drawn between Pinole Point and Lone Tree Point than to dredge and dump in deep water. All of the opinion evidence offered by the Government was received by the court under objection, and at the conclusion of the case ruled out and the jury instructed to render a verdict for the defendants.

It is thus apparent that the real question in the case is whether the contract relet for the completion of the work under paragraph 4 of the original contract was a contract for work for which Axman was bound and which he had failed to carry out, or whether it was a different contract and therefore one for which Axman and his surety cannot

234 U. S.

Opinion of the Court.

be held and which cannot be used for the measure of recovery for breach of the original contract.

The Government insists that the main purpose of the original contract was to secure the dredging of the channel and that the place of dumping the spoil was but incidental. The contract, however, does not so read. It specifically made the place of dumping the spoil an essential and particular term of the contract. It is not necessary to inquire into the reason which actuated the Government in making this requirement. It may be that it desired the spoil to be retained at a place outside of the channel and that such retention was a better way of doing the work than to deposit the spoil in deep water. It is enough to say that the contract, part of which we have heretofore set forth, specifically provided for dumping the spoil behind the bulkhead. As we have said, the engineer refused permission to dump the spoil at a place other than that designated in the specifications. This position of the engineer was warranted by the terms of the contract, for by paragraph 36 of the specifications the depositing of material and impounding it behind bulkheads as provided in the contract were made an essential part of the work to be done, and it is provided by specification 38 that material deposited otherwise than as specified will not be paid for, and by paragraph 39 that all dredged material was to be deposited within the area specified in paragraph 36, and by paragraph 53 that all material must be excavated and deposited under the supervision of the engineer officer in charge. It therefore follows that not only was Axman to dredge the channel as required by the contract, but he was to deposit the spoil as therein specified. Dredging the channel would not be enough to show performance of his contract, unless he complied with the other material requirement as to the deposit of the spoil. The new contract contained a different stipulation as to the dumping of the spoil. Upon the showing made in this case we think the change in the

place of dumping the spoil was very material, and could not be made consistently with the terms of the agreement under which Axman undertook to perform the work or be liable as stipulated in paragraph 4.

Both sides refer to the case of *United States v. McMullen*, 222 U. S. 460. In that case a suit was brought upon a contract and bond, the contract providing for certain dredging. The contractor asked for leave to dump the spoil in deep water instead of on shore, which was at first refused, but afterwards granted. The contractor, however, failed to do the work and abandoned it. The Navy Department declared the contract void, and, after advertising, entered into a new contract. The defense principally made and treated of in the opinion of the court rested upon the alleged extension of time which it was contended worked a discharge of the surety. After disposing of that question in favor of the Government, this court said (p. 471):

"The objection that the second contractor does not appear to have completed the work intended to be accomplished by the first, that is to have made a channel of a certain depth, does not impress us. The first contract was for certain work for a certain object, but limited and subject to change as the appropriations might require. The second was for the same on the same plans and specifications, the only difference being in the parties, the price, and the liberty given to the second contractor to dump in deep water, which diminished the cost. In the first contract the Government reserved an absolute right of choice in this regard. Whether the object of the contract was attained is immaterial, so long as the work done towards it was work that the first contractor had agreed to perform."

We thus observe that in the *McMullen Case* it was found that the liberty given to the second contractor to dump in deep water did not change the contract, because in the

234 U. S.

Opinion of the Court.

first contract the Government reserved an absolute right of choice in this regard. In the present case there was no such right of choice. The place of dumping spoil was made as we have said, a specific requirement of the contract. Under paragraph 6 such changes as are here involved must be agreed upon in writing by the contracting parties, the agreement setting forth clearly reasons for the change, giving quantity and prices, to take effect only upon the approval of the Secretary of War. Minor changes are provided for in paragraph 58 of the specifications, but clearly such an important change as this one has proven to be is not of that character.

In the *McMullen Case*, in treating of the right reserved in the first contract giving the Government an absolute choice of the dumping ground, it was concluded, "whether the object of the contract was attained is immaterial, so long as the work done towards it was work that the first contractor had agreed to perform." We are clearly of the opinion in this case that the work done under the second contract was not the work which the first contractor had agreed to perform. While it is true it accomplished the dredging of the channel in the same Bay, it did this with a disposition of the spoil not permitted under the first contract and in a material matter was different from the contract first entered upon.

We reach the conclusion that the Circuit Court of Appeals rightly decided this case, and its judgment is accordingly

Affirmed.